SUPREME COURT, U.S.
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No.
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IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

BRUCE WAYNE MORRIS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Bruce Wayne Morris was convicted of capital murder in 1987. In 1999, the district court denied relief, but the Ninth Circuit Court of Appeals remanded the case to the district court for an evidentiary hearing pertinent to several of Morris's claims. After the remand, Morris informed the district court (and the Ninth Circuit) that he wished to forego further judicial proceedings. The district court issued an order to show cause why the petition for writ of habeas corpus should not be dismissed and set a hearing date. At the request of Morris's counsel, however, the Ninth Circuit without explanation recalled its earlier mandate, issued a writ of mandamus to prevent the district court hearing, and vacated Morris's penalty based on instructional error. The questions presented are:

1. Whether the Ninth Circuit acted without jurisdiction under Article III and abused its discretion when it vacated the district court's hearing on Morris's request to stop further proceedings and recalled the mandate to decide Morris's case without any determination as to Morris's competency to waive further proceeding.

2. Whether the Ninth Circuit's holding–that the penalty phase jury was prejudicially confused by a jury instruction that mistakenly stated that if the jury had a reasonable doubt between the penalties of death or life *without* the possibility of parole that it shall impose the sentence of life *with* the possibility of parole–conflicts with *Jones v. United States*, 527 U.S. 373 (1999).

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OPINION OR JUDGMENT BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 273 F.3d 829 (9th Cir. 2001). (App. A at pp. 1-29.) The district court's order to show cause is unreported and is reproduced as Appendix D.

STATEMENT OF JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. section 2254. The judgment of the court of appeals entered its judgment on December 6, 2001. The petition for rehearing was denied on January 24, 2002. (App. B.) The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

Article III, § 2 of the Constitution of the United States of America provides in pertinent part that "[t]he judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies. . . . "

Section 2254(a) of Title 28 of the United States Code provides in pertinent part that,

> a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States.

STATEMENT

In 1985, Bruce Wayne Morris committed a "brutal and heinous" act of murder and robbery when he "viciously attacked and killed" Ricky Van Zandt, a man who had "gone out of his way to help." Morris and his female companions. In the penalty phase, there was evidence of Morris's prior kidnaping and attempted rape convictions, his troubled childhood, his positive qualities, and his mild-to-moderate mental dysfunction. *People v. Morris*, 53 Cal. 3d 152, 234, 807 P.2d 949, 279 Cal. Rptr. 720 (Cal.1991). The Ninth Circuit has described the evidence of Morris's guilt, which consisted of numerous confessions and admissions, as "unusually strong. . . ." (App. A at p. 17.)

Morris filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California under 28 U.S.C. section 2254. The district court granted the respondent's motion for summary judgment and denied the petition. However, the Ninth Circuit remanded Morris's case for an evidentiary hearing on claims of ineffective

assistance of counsel and incompetency. *Morris v. Woodford*, 229 F.3d 775 (9th Cir. 2000), cert. denied, 532 U.S. 1075 (2001).

After the remand, Morris initiated correspondence with both the district court and the Ninth Circuit requesting an end to further review of his case. Morris reiterated this request in a series of pleadings. (Apps. C; D at p. 2.) The district court issued an order to show cause why the petition for writ of habeas corpus should not be dismissed and set a hearing date. (App. D.) Meanwhile, unbeknownst to Morris, his appointed counsel filed a motion for stay and petition for writ of mandamus in the Ninth Circuit Court of Appeals. Morris's counsel also asked the Ninth Circuit panel to recall the mandate to decide the issues it had earlier declined to resolve when it remanded Morris's case for an evidentiary hearing. The Ninth Circuit stayed the OSC hearing in the district court, requested briefing about the district court's power to hold the OSC hearing, and requested briefing concerning the recall of the mandate. (App. E.)

Morris then asked the Attorney General to transmit a personal pleading to the Ninth Circuit in which he stated that his counsel had filed the petition to "stop" the district court hearing against his wishes and without his knowledge. Morris asked the Ninth Circuit to "end" his appeal or explain why he could not. (App. F at pp. 6-7.)

Although the Ninth Circuit received Morris's personal pleading, it did not respond. Instead, without any explanation other than a general reference to the "interests of justice," the Ninth Circuit issued an opinion which recalled the mandate, granted the petition for writ of mandamus to prevent the OSC hearing, and vacated the penalty phase of Morris's cases on grounds of instructional error. The court's opinion does not mention that this extraordinary sequence of events was initiated by Morris's repeated requests to end further proceedings in his case. It did not resolve the question raised by Morris and the district court as to whether Morris was competent to waive further proceedings. (App. A at p. 2.)

The Ninth Circuit affirmed the district court's earlier denial of Morris's claims of guilt phase error. In particular, the court noted that evidence of Morris's guilt for the murder of Rickey Van Zandt consisted of his numerous admissions of guilt and corroborating physical evidence. "As the California Supreme Court majority noted, Appellant's own admissions were the 'cornerstone' of the state's case and constitute unusually strong evidence of guilt." (App. A at p. 17.)

However, the Ninth Circuit vacated Morris's penalty phase because of an instructional error. The jury had received a mistakenly typed instruction which read as follows:

> If you have a reasonable doubt as to which penalty to impose, death or life in prison *without* the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty of life in prison *with* the possibility of parole. [emphasis added.]

The instruction was patently erroneous since it told the jurors to impose a lesser sentence of life with the possibility of parole if they could not decide between the greater sentences of death and life without the possibility of parole. The panel held that it was reasonably likely the jury was confused by this instruction to believe that Morris would actually receive the third lesser sentence of life with the possibility of parole if the jury could not agree unanimously on the greater sentences of death or life without the possibility of parole.

The court also found that the error was not harmless since the jury was deadlocked and the trial court did not clarify the instruction when the jury inquired about its meaning. The court held that this Court's opinion in *Jones v. United States*, 527 U.S. 373, was not "controlling" since there was no indication in *Jones* that the jury was actually confused. (App. A.)

REASONS FOR GRANTING WRIT

I.

THE NINTH CIRCUIT'S UNEXPLAINED PREEMPTION OF THE DISTRICT COURT IN MORRIS'S CASE AND RECALL OF ITS MANDATE WITHOUT ANY DETERMINATION AS TO MORRIS'S REPEATED REQUESTS TO END FURTHER PROCEEDINGS IN HIS CASE VIOLATED THE "CASE OR CONTROVERSY" JURISDICTIONAL REQUIREMENT

Morris himself posed the issue to the Ninth Circuit: "What I am asking the Court is simple, do I have the right to end my federal appeal as other death row prisoners have?" (App. F at p. 6.) The Ninth Circuit's answered "No."

Despite the lack of any evidence of incompetency and even though Morris demonstrated a full understanding of the consequences of his decision to forego further proceedings, the Ninth Circuit recalled its mandate and decided his case without determining whether there was a "case or controversy" under Article III. (App. A, C, D, & F.) Since the case had lost an essential element of a justiciable controversy, "[t]he Ninth Circuit had no warrant to proceed it as it did." *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). The Ninth Circuit's cryptic reliance on "interests of justice" constitutes an abuse of its discretion. *Calderon v. Thompson*, 523 U.S. 538, 549 (1998).

A. The Ninth Circuit's Intervention In The District Court OSC Proceedings Constitutes An Unacceptable Departure From The Accepted And Usual Course Of Judicial Proceedings Since Morris Had Asked To End Further Proceedings In His Case

Federal courts are limited to an actual "case or controversy." U.S. Const., art. III, § 2; *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). The controversy must be "extant" at all stages of review, not just at the initiation of the case. *Arizonans*, 520 U.S. at 67. Adversity is a prerequisite to a "case" under Article III. *Hohn v. United States*, 524 U.S. 236, 241 (1998). There is no "case or controversy" if a party to a lawsuit, including a prisoner under sentence of death, makes a knowing, intelligent, and voluntary waiver of his right to proceed and his access to court is otherwise unimpeded. *Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990) (standards for "third party" or "next friend" standing).

After the remand, Morris filed two motions to stop any further federal review and appeals. He asked to personally address the court since his counsel would not represent him on his request. When the Magistrate Judge conducted a status hearing without Morris's personal presence, Morris objected to this procedure and advised that his request to stop further federal review was still "operative." When the Magistrate Judge denied Morris's request, Morris then pressed his request by seeking reconsideration from the district court itself. The district court examined this record, including Morris's prior attempts to end his case. The district court found that Morris's counsel had always "resist[ed]" Morris's requests, but that whatever their "understandabl[e]" concerns, Morris was "correct" that he had the right to withdraw his petition. Since there was no evidence Morris was incompetent, it was "incumbent" upon the district court to "accede" to Morris's request. The district court ordered a hearing and cited Ninth Circuit authority that a petitioner "is entitled to guide the course

of his litigation, including dismissing his action either on his own or through an attorney of his choice, provided he is mentally competent to do so." *Mason ex rel. Marson v. Vasquez*, 5 F.3d 1220, 1223 (9th Cir. 1993). (App. D. at pp. 1-6.)

Without any meaningful explanation as to how the district court had abused its discretion, the Ninth Circuit granted a petition for writ of mandamus filed by Morris's appointed counsel to stop the court's scheduled hearing. It then recalled its mandate and reversed the penalty in Morris's case on an issue it had previously declined to decide. The panel did not even acknowledge a personal pleading it had received from Morris disavowing the actions of his lawyers. (App. A. at p. 2; App. F.)

The Ninth Circuit's issuance of the extraordinary writ amounts to a finding that the district court had engaged in a "judicial usurpation of power." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). Yet, the appeals court did not explain how the district court abused its discretion. The Ninth Circuit left the district court with no guidance as to when it was appropriate to conduct a hearing concerning a prisoner's competency to waive further proceedings.

The Ninth Circuit's action amounted to a sub silentio adoption of the paternalistic view of Article III jurisdiction this Court rejected in *Whitmore*, 495 U.S. at 164 (habeas corpus not available to "intruders or uninvited meddlers."). As even a member of the Ninth Circuit panel, Judge Fletcher, conceded in another forum:

> A strong argument could be made that some or all of these constitutional rights are personal to the accused [a capital defendant], and that therefore an outsider (even a relative) should not be able to interfere with the decision of the person actually convicted about how best to manage his affairs.

W.A. Fletcher, The Structure of Standing, 98 Yale L.J. 221, 279

(1988). The panel opinion, joined by Judge Fletcher, does not explain why it rejected Morris's "strong argument . . . to manage his affairs."

Article III jurisdiction is about the "right of self determination and freedom to make fundamental choices affecting one's life." *Sanchez-Velasco v. Secretary of the Department of Corrections*, __ F.3d __, 2002 WL 487539 (11th Cir. 2002). In the face of Morris's requests, the Ninth Circuit could not make an exception to this Constitutional requirement based on any "untethered notions of what might be good public policy," pragmatic considerations, or its views on the relative merits of any of Morris's claims. *Whitmore*, 495 U.S. at 161; *Sanchez-Velasco, supra*; *White v. Bell*, 242 F.3d 338, 342-343 (6th Cir. 2001); *Hauser ex rel. Crawford v. Moore*, 223 F.3d 1316, 1321 (11th Cir. 2000); *Gilmore v. Utah*, 429 U.S. 1012, 1015-1016 ns.4-5 (Burger, C.J. conc.), 1017-1018 (White, J. dis.) In the face of Morris's repeated requests to end his case – requests so credible that a district court scheduled an OSC hearing – the Ninth Circuit acted without jurisdiction when it intervened to decide Morris's case without deciding if there was any "case" at all.

B. The Question Of Judicial Response To Prisoners Who Ask To End Their Proceedings Is An Important One Which Should Be Settled By This Court

This Court has not yet decided "whether a hearing on mental competency is required by the United States Constitution whenever a capital defendant desires to terminate further proceedings. . . . " *Whitmore*, 495 U.S. at 164. However, absent guidance from this Court to the contrary, the district court here was well within its discretion and had reasonable cause to order the OSC hearing in Morris's case.

The implications of the Ninth Circuit's actions in this case are manifold. Litigation concerning state prisoners under

sentence to death who ask to dismiss further proceedings on their behalf is an important, recurring issue. As of this year, 12 percent of the executions that have occurred since 1976 were due to waivers of further proceedings. Death Row U.S.A., Winter 2002 (Crim. Just. Proj,, NAACP Leg. Defense and Educ. Fund, Inc.) at pp. 10-23). Two of California's ten executions involved prisoners who waived further proceedings in federal court. California's federal district courts handled both cases in commendable fashion. *Mason ex rel. Manson v. Vasquez*, 5 F.3d 1220 (9th Cir. 1993); *Massie ex rel. Kroll v. Woodford*, 244 F.3d 1192 (9th Cir. 2001).

For a variety of reasons almost all inmates consider ending their cases. Welsh S. White, *The Death Penalty in the Ninties*, 165 (1991); Note, 50 Stan. L. Rev. 1897, 1902 (1998). The case law is replete with examples of inmates, like Morris, whose state of mind has changed and evolved over time into a resolute stance. *See, e.g., Mata v. Johnson*, 210 F.3d 324, 327 & n.1, 333 (5th Cir. 2000); *Sanchez-Velasco, supra*; *United States v. Hammer*, 226 F.3d 229 (3rd Cir. 2000); *Massie, supra*; *see also Lenhard v. Wolf*, 443 U.S. 1306, 1312-1313 (Rehnquist, J. in chambers)(1979) *Lenhard v. Wolf*, 603 F.2d 91, 94 (9th Cir. 1979) (Sneed, J. conc.). How to handle these sensitive matters is a challenge to both the state and federal courts that are confronted with them. Unfortunately, since *Whitmore*, there is still no definitive guidance on the courts' duties. The Ninth Circuit offered no clue about why the district court in Morris's case acted erroneously in this recurring situation. It also did not explain how Morris's request constituted a "grave, unforeseen" contingency justifying its extraordinary action of recalling the mandate. *Calderon*, 523 U.S. at 549.

Since a federal court has no jurisdiction unless there is a case or controversy, one party's desire at any time to end the litigation goes directly to the federal court's constitutional power to adjudicate the case. *Sanchez-Velasco, supra*. Since these cases in federal court involve collateral attacks on state court judgments, the decision of a prisoner to end further

litigation implicates the public interest in finality. *Calderon*, 523 U.S. at 555.

Given the stakes involved, the prisoner's desire to end the case impacts the duties of his federally appointed counsel. 50 Stan.L.Rev. at 1901; Comment, 25 Cap.U.L.R. 643 (1996); Note, 24 New Eng.J. on Crim &Civ. Confinement 279 (1998). In this case, Morris's counsel have consistently resisted his requests to end his case to the point that Morris actually took the extraordinary action of asking the Attorney General to file his personal pleading with the Ninth Circuit to end his case–a pleading the Ninth Circuit received and ignored.

Finally, Morris's question goes to one of the basic motivations of the case or controversy requirement – the autonomy of the individual which is the lifeblood or the law and Article III jurisdiction. *Illinois v. Allen*, 397 U.S. 337, 350-351 (1979); *Valley Forge Christian College v. Americans United for Separation of Church & State Inc.*, 454 U.S. 464 (1987). The district court's measured endeavor to protect Morris's personal rights was usurped by Morris's counsel and silently disregarded by the Ninth Circuit Court of Appeals.

Morris was concerned that he was simply part of a cycle of litigation that would never result in his release. Given the "unusually strong evidence" of his guilt, his concern was understandable. Although this Court has not yet offered any definitive guidance, the district court ordered a hearing to inquire into Morris's repeated expressed desire to end his case. Yet, Morris's counsel and the Ninth Circuit inexplicably and surreptitiously precluded the district court from giving Morris the opportunity to make an informed choice about his options.

Morris asked the Ninth Circuit a simple question-did he have the right to end his case? Without so much as the courtesy of a by-your-leave, the court apparently issued an advisory opinion that was beyond its jurisdiction under Article III. Morris, the State, and the district court now turn to this Court for an answer and guidance as to Morris's query.

II.

THE NINTH CIRCUIT'S REVERSAL OF MORRIS'S PENALTY PHASE DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *JONES V. UNITED STATES*, 527 U.S. 373 (1999)

In its haste to recall the mandate before the district court could conduct a hearing to determine Morris's competency to terminate further proceedings in his case, the Ninth Circuit also strained to reverse Morris's death judgment. The panel focused on an erroneously typed penalty phase instruction to hold that the jury in Morris's penalty trial was prejudicially confused to believe that if it could not unanimously agree as to either death or life imprisonment *without* the possibility of parole, that Morris would receive the third lesser sentence of life imprisonment *with* the possibility of parole. As will be shown, this decision directly conflicts with this Court's earlier opinion in *Jones v. United States*, 527 U.S. 373.

The mistakenly typed instruction read:

> If you have a reasonable doubt as to which penalty to impose, death or life *without* the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty of life *with* the possibility of parole. [emphasis added.]

The jury had otherwise been repeatedly instructed that the only two available sentences were death or life without the possibility of parole. The trial court had advised the jury that the statutes provided for what happened if the jury was unable to reach a verdict and that the court could not advise the jury of "what that is at this point in time." When asked about the erroneously typed instruction, the trial court mistakenly advised the jury that the instruction was "self-explanatory." The trial court also specifically instructed the jury that life imprisonment

without the possibility of parole meant that "the defendant shall be imprisoned for the rest of his life." At all times, the trial court instructed the jury that it could only impose a sentence of death or life imprisonment without the possibility of parole. The only verdict forms were for death or life without parole. (App. A at pp. 18-29.)

The Ninth Circuit acknowledged that the United States Supreme Court's opinion in *Jones v. United States*, 527 U.S. 373 dealt with the same issue presented by Morris's case.

> As in this case [Morris's], the Appellant in *Jones* argued that the penalty-phase jury instructions might have misled the jury into believing that, if it could not choose between death and life without parole, then the court would impose a lesser sentence.

(App. A at p. 27.)

In *Jones*, the United States Supreme Court found no prejudice. The Ninth Circuit distinguished *Jones*: "*Jones* is not controlling here because, in that case, there was no indication that the jury actually was confused by any of the instructions." (App. A at p. 28.) The Court then found that the error in Morris's case was not harmless under *Brecht v. Abrahamson*, 507 U.S. 619 because it was in "grave doubt" about the effect of the erroneous jury instruction. *O'Neal v. McAninch*, 513 U.S. 435 (1995). (App. A at pp. 28-29.)

Contrary to the Ninth Circuit's opinion, *Jones* is indistinguishable from this case and by the Ninth Circuit's own terms is "controlling." This is no mere inconsistency. *Jones* squarely forecloses the Court's prejudice analysis in Morris's case since it explicitly dealt with jury confusion as follows:

> Moreover, **even assuming that the jurors were confused over the consequences of deadlock,** Appellant cannot show the confusion necessarily worked to his detriment. It is just as likely that the jurors, loath to recommend a lesser sentence, would

> have compromised on a sentence of life imprisonment as on a death sentence. Where the effect of an alleged error is so uncertain, a defendant cannot meet his burden of showing that the error actually affected his substantial rights. *Cf. [Romano v. Oklahoma*, 512 U.S1, 14(1994)]. In *Romano*, we considered a similar argument, namely, that jurors had disregarded a trial judge's instructions and given undue weight to certain evidence. In rejecting that argument, we noted that, even assuming that the jury disregarded the trial judge's instructions,'[i]t seems equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so.' *Ibid.* Any speculation on the effect of a lesser sentence, like the sentence in Romano, would have had such an indeterminate effect on the outcome of the proceeding that we cannot conclude that any alleged error in the District Court's instructions affected Appellant's substantial rights. [citations omitted]/

Jones, at 394-395. [emphasis added].[1/]

The conflict between *Jones* and the Ninth Circuit analysis is irreconcilable. The Ninth Circuit acknowledged that

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1. In this case, as in *Jones*, the jury was specifically instructed that Morris would never be released if it imposed a sentence of life without the possibility of parole. Given these circumstances, the erroneous jury instruction could not have been the motivating reason behind the jury's ultimate unanimous death sentence. To conclude otherwise would mean that jurors who favored death would have irrationally held out for that verdict and run the risk of a deadlock which could result in Morris's eligibility for parole. There is no basis to assume such irrationality. *See, e.g. Schad v. Arizona*, 501 U.S. 624, 647 (1991).

Jones dealt with the same allegation of instructional error. Yet, it distinguished *Jones* on the basis that there was no evidence of jury confusion in *Jones*, while there was evidence of confirmation in Morris's case. However, *Jones* explicitly rejected a claim of prejudice even assuming juror "confusion" about the consequences of a potential deadlock about penalty. The distinction with *Jones* made by the Ninth Circuit simply does not exist.

Just as significantly, by disregarding *Jones*, the Ninth Circuit's opinion transformed the "grave doubt" standard for harmless error on collateral review articulated by this Court in *O'Neal v. McAninch*, 513 U.S. 435. Rather than confining "grave doubt" to "special" or "unusual" circumstances" as stated in *O'Neal*, the Ninth Circuit has now expanded its coverage to matters of only uncertain speculation. This was the standard rejected in *Jones*.

It can hardly be gainsaid that harmless error analysis is an important recurring issue. It is integral to promoting public respect for the criminal justice system, minimizing the substantial social costs of retrials, mediating federal-state relations, and ensuring the prompt administration of justice. *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *United States v. Mechanik*, 475 U.S. 66, 72 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Application of harmless error acquires even greater importance in federal collateral review since relief is reserved for only the most "grievously wronged." *Brecht*, at 637.

The Ninth Circuit's finding of prejudice squarely conflicts with *Jones*. By engaging in the speculative analysis that *Jones* rejected, the Ninth Circuit's opinion itself injects confusion and uncertainty into the harmless error analysis for collateral review under *Brecht* and *O'Neal*. The expansion of the harmless error standard is an important question, especially when it conflicts with the explicit pronouncements of this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: April 24, 2002

Respectfully submitted,

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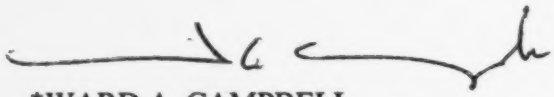

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APPENDIX "A"

United States Court of Appeals,
Ninth Circuit.

Bruce Wayne MORRIS, Petitioner-Appellant,
v.
Jeanne WOODFORD, Acting Warden of California State Prison at San Quentin,
Respondent-Appellee.
Bruce Wayne Morris, Petitioner,
v.
United States District Court, Eastern District of California (Sacramento),
Respondent,
Jeanne Woodford, Warden, San Quentin Prison, Real Party in Interest.

Nos. 99-99028, 01-71622.

Submitted Nov. 16, 2001. [FN*]

FN* The panel unanimously finds these cases suitable for decision without further oral argument. Fed. R.App. P. 34(a)(2).

Filed Dec. 6, 2001

***828** Marianne D. Bachers, San Francisco, California; and Tony Tamburello, Tamburello, Hanlon & Waggener, San Francisco, California, for the petitioner-appellant.

Ward A. Campbell, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

Appeal from the United States District Court for the Eastern District of California; Edward J. Garcia, District Judge, Presiding. D.C. No. CV-92-00483- EJG-GGH.

Before: FERGUSON, GRABER, and W. FLETCHER, Circuit Judges.

Petition for Writ of Mandamus

GRABER, Circuit Judge:

More than a year ago, we granted a certificate of appealability (COA) on several issues raised by Petitioner Bruce Wayne Morris in this 28 U.S.C. § 2254 action but, in the interest of judicial economy, we remanded the case for an evidentiary hearing on certain of his claims. *Morris v. Woodford,* 229 F.3d 775, 781 (9th Cir.2000), *cert. denied,* --- U.S. ----, 121 S.Ct. 2238, 150 L.Ed.2d 227 (2001). For a variety of reasons, no hearing has yet taken place. The judicial economy that we sought to achieve has not materialized. Petitioner's lawyers have filed a writ of mandamus to compel a stay of proceedings in the district court. The writ is granted. In the interest of justice, we have recalled the mandate and issue this opinion on the merits.

We affirm the district court's grant of summary judgment with respect to the guilt-phase issues that are ripe for our review. We leave undecided those guilt-phase issues that are not yet ripe. With respect to the penalty phase, we reverse and remand with instructions to vacate Petitioner's sentence of death and order a new penalty-phase trial.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner was indicted for the 1985 murder of Rickey Van Zandt. [FN1] He was tried in front of a jury. The state's theory of the case was that Petitioner killed Van Zandt as part of a plot to steal his van. The state introduced evidence to demonstrate the following: Petitioner, his girlfriend Avette Barrett, and her sister, Allison Eckstrom, were hitchhiking from Sacramento to Lake Tahoe. Van Zandt picked them up. Petitioner formulated

a plan to steal Van Zandt's van. At night, while Van Zandt was sleeping in the van, Petitioner beat him with a rock until he was unconscious. Petitioner then took Van Zandt from the van and rolled him down a hill. Upon discovering that Van Zandt still was alive, Petitioner beat him to death with a stick.

> FN1. Petitioner calls the victim "VanZant" in his petition and "Van Zant" in his briefs to this court. The California Supreme Court, the magistrate judge, the district court, and the state spell the victim's name "Van Zandt" and, accordingly, we use that spelling in this opinion.

Petitioner and the two women then drove around the western United States in Van Zandt's van, making purchases with the victim's credit cards. Eventually they arrived in Nebraska, where they picked up a hitchhiker, Tom Logan. Petitioner told Logan that he had killed Van Zandt in order to steal the van, stating that he had "really rocked and rolled him." Later, Petitioner told Logan that he had been "kind of coerced" into killing Van Zandt by Barrett.

Logan fled and called the police, who arrested Petitioner, Barrett, and Eckstrom the next day. Among the items that the police seized after the arrest were Petitioner's jeans, which were splattered with blood above the knees.

Shortly after he was arrested, Petitioner asked to speak to an officer. He was advised of his constitutional rights and agreed to make a statement. Before he made the statement, he was allowed to talk to Barrett; he told her that he would not "let [her] suffer for something [she] didn't do."

Officers then interviewed Petitioner for approximately one hour. During the interview, Petitioner admitted that he had hit Van Zandt on the head between 12 and 14 times with a rock the

size of a softball. He stated that he might have talked beforehand about killing Van Zandt to steal his van, but later stated that he had only wanted to knock Van Zandt out and tie him up. He further stated that Barrett and Eckstrom had told him not to do anything to Van Zandt, but that he had responded that they should "take off" while he "finished what [he was] going to do." Finally, he told officers that, after Barrett and Eckstrom left, he "knocked the man out and pulled him off to the side of the hill" and that he hit Van Zandt with a stick when Van Zandt started to get up.

Later, while Petitioner was in custody in California, he wrote a letter to Barrett, which prison officials intercepted. That letter read, in part: "I've killed once for you, and if I have to I'll do it again!!! And you know that I can, and I don't need a rock to do it either." The state also produced evidence that, while he was in the Sierra County jail, Petitioner told two fellow inmates that he had hit a man's skull with a rock 13 times.

Testifying in his own defense at trial, Petitioner denied killing Van Zandt and stated that he had admitted to the killing in an effort to protect Barrett and Eckstrom. His story was that he had returned to the van after fishing to find Barrett and Eckstrom upset. Both had blood on their dresses. Petitioner testified that Barrett told him she had struck Van Zandt with a rock in self- defense when he tried to rape her. According to Petitioner, he then found Van Zandt unconscious but alive in the van and pulled him out. Then Eckstrom struck Van Zandt with a stick, killing him.

Petitioner also called an expert who testified that she had found traces of semen on Van Zandt's underwear. The expert was unable to state, however, when or how the semen had been deposited.

Finally, Petitioner called three female inmates who had been

housed in the Nevada County jail with Barrett. Those inmates testified to statements by Barrett implying that Petitioner was accepting responsibility for Van Zandt's killing out of love for Barrett. All conceded, however, that Barrett had made inconsistent statements about the killing.

The jury found Petitioner guilty of first-degree murder and robbery and further found the special circumstance that Petitioner had committed the murder during the commission of the robbery. At the penalty phase, the jury sentenced Petitioner to death. The subsequent procedural history of the case is detailed in our earlier opinion. *Morris,* 229 F.3d at 777-78.

STANDARD OF REVIEW

This court reviews de novo a district court's decision to deny a petition under 28 U.S.C. § 2254. *McNab v. Kok,* 170 F.3d 1246, 1247 (9th Cir.1999) (per curiam). Because Petitioner filed his petition before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the provisions of that Act do not apply to the merits of this appeal. *Ainsworth v. Calderon,* 138 F.3d 787, 790 (9th Cir.), *amended on denial of reh'g,* 152 F.3d 1223 (9th Cir.1998).

DISCUSSION

A. *Guilt-Phase Claims*

1. *Claim 24: Alleged Caldwell Error*

When the jury venire appeared for voir dire, the trial court said to the prospective jurors:

> As far as the process is concerned, let me explain a little about that. You need not, and will not, have to worry about the death penalty in the event that you find, first of all, that there was not a murder or that the murder wasn't in the first degree.

. . . . . .

You may never get to that point, but we still have to talk to you about how you feel about the death penalty.

The supreme court, for the last 56 cases that they have decided about the death penalty, and I'm sure all of you have read about the supreme court. There have been 56 cases, ladies and gentlemen, since 1972, I believe, that have talked about the death penalty cases. Fifty-three of them were reversed, three of them were affirmed.

In those cases, we were given guidelines. I, as a trial judge, was given guidelines as to how we talk to you about this matter. Those guidelines are still in effect. I'm still bound by them and so are you. None of us are above that law.

So I have to talk to you about how you feel about the death penalty.

Later, outside the presence of the jury, defense counsel objected to that statement, arguing that it might cause some jurors to treat their death-penalty deliberations as "an academic exercise" in view of the possibility of reversal. The court agreed that the statement was inappropriate and asked defense counsel what he thought the court should do. Counsel responded: "We would ask for an admonishment because with the new court [three members of the California Supreme Court recently had been recalled], death may very well mean exactly that." Counsel did not ask the court to replace the jury venire to which the statement had been made.

The court agreed to admonish the prospective jurors. When they returned, the court told them:

Ladies and gentlemen, I have been requested to admonish you a little bit about what I said in the beginning concerning the amount of cases heard by the supreme court, 56, I believe I mentioned in number and reversals thereon.

The Court, me, personally, did not mean to indicate to you one way or the other how I felt about that matter. The Court

> only wanted to indicate to you that those 56 cases gave us guidelines, which I am obligated--and I think I told you that, that I'm obligated to follow in cases of this nature. And that's all I intended to do. I did not intend to indicate my favor or disfavor of those decisions. I only indicated it was a threshold, the comment concerning the guidelines, that we have to follow.
>
> And now I'm going to tell you about those guidelines.

Defense counsel did not object to the admonition, move for a mistrial, or otherwise indicate further concern about this matter until direct appeal.

On direct appeal, Petitioner argued that the court's statement minimized the jury's sense of responsibility for the death sentence by improperly suggesting that such a sentence likely would be reversed. That improper suggestion, Petitioner contended, denied him due process under *Caldwell v. Mississippi,* 472 U.S. 320, 328-29, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (holding that prosecutor's comments suggesting that appellate court, not jury, was final determiner of death sentence denied the petitioner due process). The California Supreme Court agreed that the statement was irrelevant and improper but concluded that it was not prejudicial in the light of the admonition, the remainder of the trial court's comments, and the jury instructions. *People v. Morris,* 53 Cal.3d 152, 279 Cal.Rptr. 720, 807 P.2d 949, 963-64 (1991).

Petitioner raised the issue again in claim 24 of his federal habeas petition. The magistrate judge concluded, as had the California Supreme Court, that the trial court's "potentially very serious mistake" was not prejudicial in view of the court's subsequent admonition and the jury instructions. The district court adopted that conclusion.

In this appeal, Petitioner recounts the court's initial statement (without mentioning the later admonition) and argues:

> The trial judge made this observation just months after the highly contentious general election in which the state supreme court's death penalty jurisprudence, and specifically the leadership of Chief Justice Rose [Bird] with respect to capital appeals, was at issue. Petitioner contends that these comments are a part of the cumulative prejudice requiring reversal of the judgments in this case.
> We are not persuaded.

While unfortunate, the trial court's comment was relatively mild, especially when viewed in the context of the trial as a whole. The court recognized its mistake almost immediately, asked defense counsel how to cure the error, and did what counsel asked. Further, the jury was instructed during the penalty phase that "a death verdict means exactly what it says. That the defendant will be executed. For you to conclude otherwise would be to rely upon speculation or conjecture and would be a violation of your oath as a juror."

In the circumstances, the district court did not err in granting summary judgment against Petitioner on claim 24.

2. *Claims 1, 2, and 14: Accomplice Arguments*

In claims 1, 2, and 14 of his petition, Petitioner raised a number of arguments concerning his accomplices, Barrett and Eckstrom. The district court rejected all those claims. We granted a COA on two issues-- whether the jury instructions on accomplice liability deprived Petitioner of a fair trial and whether the accomplices' plea agreements were unduly coercive.

(a) *Jury Instruction: Accomplice Liability*

Petitioner argues that the trial court's guilt-phase instruction concerning accomplice liability deprived him of a fair trial. Specifically, he contends that the trial court's instruction

"precluded the jury from giving any meaningful evidentiary consideration to Petitioner's guilt phase defense--in effect, a verdict was directed against him on the issue of actual perpetration of the homicide."

As noted, Petitioner's primary guilt-phase argument was that Barrett had killed Van Zandt. Barrett and Eckstrom testified that Petitioner had killed Van Zandt. Petitioner requested the following jury instruction concerning accomplice liability:

> An accomplice is a person involved in the commission of the offense charged against the defendant whether by directly committing the act constituting the offense or aiding and abetting in its commission. A person can be an accomplice even though the acts were committed at a different time and place than the acts charged against the defendant.

The district court declined to give that instruction. Instead, the court instructed the jury as follows on the issue of accomplice testimony (the particular instruction to which Petitioner objects is underlined):

> An accomplice is one who is subject to prosecution for the identical offense charged against the defendant on trial.
>
> To be an accomplice, the person must have aided, promoted, encouraged or instigated by act or advice the commission of such offense with knowledge of the unlawful purpose of the person that committed the offense and with the intent or purpose of committing, encouraging or facilitating the commission of the offense.
>
> A defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense.
>
> To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the offense which, if believed by itself, and without any aid, interpretation or direction from the testimony of the accomplice tends to

connect the defendant with the commission of the offense charged.
However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the offense charged or that it corroborate every fact to which the accomplice testified.
In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense.
If there is not such independent evidence which tends to connect the defendant with the commission of the offense, the testimony of the accomplice is not corroborated.
If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.
The required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of his accomplices, but must come from other evidence.
Merely assenting to or aiding or assisting in the commission of a crime without knowledge of the unlawful purpose of the perpetrator is not criminal. And a person so assenting to or aiding and assisting in the commission of a crime without such knowledge is not an accomplice in the commission of such crime.
If the crimes of robbery and murder were committed by anyone, the witness' [sic], Avette Barrett and Allison Eckstrom, were accomplices as a matter or law, and their testimony is subject to the rule requiring corroboration.
The testimony of an accomplice ought to be viewed with distrust and received with care, caution and suspicion for the reason that its very source is tainted.

Petitioner argues, as he has throughout these proceedings, that the emphasized part of the instruction "explicitly and impliedly told the jurors that Barrett and Eckstrom were witnesses and

assistants to Petitioner--in other words, they were to give no consideration to Petitioner's argument that they killed Van [Zandt], and that he did not." That is, he reads the phrase "the witness' [sic], Avette Barrett and Allison Eckstrom" to refer to the two as *witnesses at the crime scene,* rather than as *witnesses at trial.*

On direct appeal, the California Supreme Court concluded that the challenged instruction was not erroneous and that, even if the instruction was erroneous, the error was harmless in view of the overwhelming evidence of Petitioner's guilt. *Morris,* 279 Cal.Rptr. 720, 807 P.2d at 983. In this proceeding, the magistrate judge concluded that the instruction was not improper, and the district court adopted the magistrate judge's conclusion.

When considering an allegedly erroneous jury instruction in a habeas proceeding, an appellate court first considers whether the error in the challenged instruction, if any, amounted to "constitutional error." *Calderon v. Coleman,* 525 U.S. 141, 146, 119 S.Ct. 500, 142 L.Ed.2d 521 (1998). If so, the court then considers whether the error was harmless. *Id.* at 145, 119 S.Ct. 500.

The test for "constitutional error" is set out in *Boyde v. California,* 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). To determine whether constitutional error occurred, an appellate court asks "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* That inquiry also can be described as having two parts: (1) whether there is a reasonable likelihood that the jury understood an assertedly ambiguous instruction to mean what the defendant suggests it means; and (2) if so, "whether the instruction, so understood, was unconstitutional as applied to the defendant." *Coleman,* 525 U.S. at 147, 119 S.Ct. 500.

If the court finds constitutional error, then it applies the test for harmless error from *Brecht v. Abrahamson,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Under *Brecht,* the appellate court considers whether the error had a " 'substantial and injurious effect or influence in determining the jury's verdict.' " *Id.* at 637, 113 S.Ct. 1710 (quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). "If we are in grave doubt as to whether the error had such an effect, the petitioner is entitled to the writ." *Coleman v. Calderon,* 210 F.3d 1047, 1051 (9th Cir.2000).

Turning to the bedrock requirement of "constitutional error," Petitioner argues that the challenged instruction was reasonably likely to be understood by the jury to declare that, as a matter of law, Barrett and Eckstrom were "assistants" and "witnesses" during the murder of Van Zandt. Therefore, Petitioner argues, the instruction precluded the jury from considering his defense that Barrett and Eckstrom actually beat Van Zandt to death.

We agree with the magistrate judge and the district court that the jury was not "reasonably likely" to interpret the instruction in that manner. "A single instruction is not viewed in isolation, but in the context of the overall charge." *United States v. Harrison,* 34 F.3d 886, 889 (9th Cir.1994). The challenged instruction was one in a long series of instructions about accomplice testimony. In context, it is reasonably apparent that the series of instructions referred to the *trial testimony* of Barrett and Eckstrom; there was no other witness at trial who reasonably could be viewed as Petitioner's "accomplice." In context, the most reasonable construction that the jury could have given to the trial court's phrase "the witness' [sic], Avette Barrett and Allison Eckstrom" was "the two women who appeared as witnesses in this trial and whose testimony I am in the middle of talking to you about, Avette Barrett and Allison Eckstrom." Petitioner's proffered construction of that phrase--"the witnesses to the crime, Avette Barrett and Allison

Eckstrom"--does not fit with the surrounding instructions and is not "reasonably likely" in view of the charge as a whole.

Nor is it reasonably likely that the jury understood the instruction to mean that they were required to view the two women as "assistants" and Petitioner as the "actual perpetrator." Petitioner substitutes the word "assistant" for "accomplice," but the instructions do not use the word "assistant." Rather, the instructions state, among other things, that an accomplice "is one who is subject to prosecution for the identical offense charged against the defendant"; that a person may be an accomplice as the result of having "aided, promoted, encouraged or instigated by act or advice the commission of such offense"; that an accomplice must have "the intent or purpose of *committing, encouraging or facilitating* the offense"; and that, "if the crimes of robbery and murder were committed *by anyone,*" Barrett and Eckstrom were accomplices, and their testimony required collaboration. (Emphasis added.) Viewing the instructions as a whole, the instructions do not state that the jury was required as a matter of law to view the two women as "assistants." Rather, they correctly instruct that if the two women had *any* active role in the crime--including, of course, actually killing Van Zandt--their testimony required corroboration. There is no reasonable likelihood that any juror would have understood the challenged instruction in the manner Petitioner proposes, as directing a verdict "against him on the issue of actual perpetration of the homicide." Accordingly, there was no error, and a fortiori, no "constitutional error."

(b) *Accomplices' Plea Agreements*

Petitioner argues that Barrett's and Eckstrom's plea agreements rendered his conviction unconstitutional. According to Petitioner, the agreements required Barrett and Eckstrom to give specific testimony implicating Petitioner, regardless of the truth or falsity of that testimony.

Barrett signed a plea agreement in January 1986. That agreement originally contained eight conditions: (1) that Barrett's representation that she did not personally injure Van Zandt was true; (2) that Barrett would be released on her own recognizance; (3) that Barrett would agree to "waive time for the commencement of the ... action pending against her" in county court; (4) that Barrett would make herself available to receive subpoenas and to take a polygraph examination; (5) that Barrett would "testif[y] completely and truthfully at all proceedings including preliminary examination and trial concerning all the facts and circumstances surrounding the killing and death of Rick[e]y Van Zandt"; (6) that Barrett would not exercise her right to remain silent during the proceedings; (7) that Barrett would take and pass a lie detector test; and (8) that Barrett would remain in California and inform the district attorney of her address. The agreement provided that if condition No. 1 were not met, or if Barrett violated any condition of the agreement, the agreement would be void. If Barrett complied with the terms of the agreement, the district attorney agreed that, after Petitioner's trial, all charges against Barrett would be dropped, with the exception of a single count of felony vehicle theft to which Barrett would plead guilty.

Eckstrom's plea agreement was similar but not identical. She received transactional immunity in exchange for her testimony. The other major difference between her agreement and Barrett's was that Eckstrom's agreement did not require her to take a polygraph test.

Before Barrett testified, the state amended her agreement to remove the condition that she not have personally inflicted any injuries on Van Zandt. That condition remained in Eckstrom's agreement.

After the prosecution and the defense both mentioned the agreements during opening argument, Petitioner sought to have

the agreements admitted into evidence. The trial court admitted Eckstrom's agreement and read to the jury Barrett's agreement, which had been modified by the deletion of condition No. 1 (the requirement that Barrett not have injured Van Zandt) and condition No. 7 (the polygraph requirement). [FN2] At trial, defense counsel cross- examined Barrett and Eckstrom about the agreements and discussed the agreements in jury arguments during both the guilt and penalty phases.

> FN2. The trial court had held that all evidence regarding polygraph tests was inadmissible.

Petitioner argued on direct appeal that the agreements were coercive and rendered Barrett's and Eckstrom's testimony unreliable and inadmissible. The California Supreme Court rejected that argument. *Morris,* 279 Cal.Rptr. 720, 807 P.2d at 970. As to Barrett, the court concluded that the agreement did not taint her testimony because the no-injury condition had been removed from the agreement before trial. The only remaining condition that bore on her testimony was the condition that she testify completely and truthfully, which condition, the court concluded, was neither coercive nor improper. *Id.*

As to Eckstrom, the court declined to reach the question whether the no-injury provision in her agreement rendered the agreement impermissibly coercive. Instead, the court concluded that, even if her testimony was improperly admitted, Petitioner was not prejudiced by the error. In that regard, the court noted that Eckstrom's testimony was not central to the state's case against Petitioner. Instead, the court concluded: "[Petitioner's] several detailed pretrial admissions of guilt were the cornerstone of the case against him." *Id.* The court reasoned:

> Even if the accomplice testimony is set aside, it remains that [Petitioner] voluntarily and unequivocally confessed his guilt three times: once to a hitchhiker he picked up in Nebraska, once in a detailed statement to Nebraska law enforcement

> officers, and once in a letter to Avette Barrett. The remaining evidence corroborates the confessions.... [T]he evidence of [Petitioner's] guilt was overwhelming and any error in admitting the accomplice testimony was harmless beyond a reasonable doubt.
> *Id.* at 971 n. 5.

Petitioner argued in his federal habeas petition that the plea agreements induced Barrett and Eckstrom to give false testimony. The magistrate judge rejected that argument, concluding (1) that the deletion of the no-injury clause from Barrett's agreement before trial removed any potentially coercive element from the agreement; and (2) that, although Eckstrom's plea agreement contained the no-injury clause and therefore "violate[d] due process in the abstract," the error in admitting her testimony was harmless in view of the overwhelming evidence of Petitioner's guilt. The district court adopted the magistrate judge's recommendation and rejected Petitioner's claim.

On appeal, Petitioner again asserts that the prosecutor bargained for specific testimony about the crime, rather than for the truth. He also argues that the removal of the no-injury condition from Barrett's agreement renders the agreement "illusory," because Barrett received "all the benefits but none of the burdens of the plea contract."

"The general rule is that an accomplice who has pled guilty may testify against non-pleading defendants without raising due process concerns." *United States v. Yarbrough,* 852 F.2d 1522, 1537 (9th Cir. 1988). Generally, such testimony will be admitted "if the jury is informed of the exact nature of the agreement, defense counsel is permitted to cross-examine the accomplice about the agreement, and the jury is instructed to weigh the accomplice's testimony with care." *Id.* Those conditions were satisfied here. In addition, a plea agreement may require an

accomplice to testify fully and truthfully without violating the Due Process Clause. *Gallego v. McDaniel,* 124 F.3d 1065, 1078 (9th Cir.1997).

Here, both plea agreements required the accomplices to testify truthfully. But, even assuming that it was error to admit their testimony, the error was harmless beyond a reasonable doubt. Petitioner asserts that his trial boiled down to a "swearing contest," with Barrett and Eckstrom blaming Petitioner for the murder, and Petitioner blaming Barrett and Eckstrom. That view of the trial ignores the most damning evidence of Petitioner's guilt: his own admissions. For example, Petitioner told hitchhiker Logan that he had killed Van Zandt in order to steal his van and that he had "really rocked and rolled him." Next, Petitioner confessed to police officers that he had hit Van Zandt on the head between 12 and 14 times with a rock that was the size of a softball, might have talked beforehand about killing him so as to steal the van, and had told Barrett and Eckstrom to leave while he finished killing Van Zandt with a stick. Not long after that, Petitioner wrote a letter to Barrett, which proclaimed: "I've killed once for you, and if I have to I'll do it again!!! And you know that I can, and I don't need a rock to do it either." Then Petitioner told two fellow inmates that he had hit a man's skull with a rock 13 times.

Even if Barrett and Eckstrom had never testified, the jury would have been left to consider those admissions--and the corroborating physical evidence, such as Petitioner's blood-spattered clothing--in the light of Petitioner's proffered explanation that he had lied about committing the crime to protect Barrett. That explanation is particularly specious when applied to the statements that Petitioner made to Barrett herself. As the California Supreme Court majority noted, Petitioner's own admissions were the "cornerstone" of the state's case and constitute unusually strong evidence of guilt. *Morris,* 279 Cal.Rptr. 720, 807 P.2d at 970.

In sum, we affirm the district court's grant of summary judgment on this claim. Any error was harmless.

B. *Penalty-Phase Claim*

During the penalty phase, Petitioner requested that the court give an instruction concerning the jurors' sentencing responsibilities. That instruction--special instruction 60--contained a typographical error. As written, the instruction read:

> If you have a reasonable doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty of life in prison *with* the possibility of parole.

(Emphasis added.) The emphasized word in the instruction should have been "without"--not "with"; life *without* parole and death are the only two sentences that California law authorized for aggravated murder under special circumstances. The trial court read the instruction, including the error, to counsel, during discussions about the penalty-phase instructions. Unfortunately, neither counsel nor the court noticed the mistake. [FN3]

> FN3. The trial court made a specific finding that the mistake in the instruction was just that, a mistake, and not a deliberate act on the part of defense counsel. The California Supreme Court agreed and concluded on that basis that the error was not "invited" by Petitioner. *Morris,* 279 Cal.Rptr. 720, 807 P.2d at 995 n. 22. The state does not challenge the trial court's factual finding of mistake, and we accept it as true.

The court agreed to give special instruction 60. When reading that instruction aloud to the jury, the court corrected the mistake, apparently unconsciously, stating:

> If you have a reasonable doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict, fixing the penalty of life in prison *with* the possibility of--*without* the possibility of parole.

(Emphasis added.) Unfortunately, the court did not correct the written instruction before submitting it to the jury for their use during deliberations.

After deliberating for a time, the jury sent the trial court a written inquiry: "In the event this jury cannot decide 100% on the penalty phase of this case what would be the sentence imposed? Please explain noted page of instructions [special instruction 60]."

The court asked that the jury be brought in, and the following colloquy took place between the court and the jury foreman, in the presence of the rest of the jury panel:

> THE COURT: Mr. Lewis, the Court has been in receipt of your question--or questions.
>
> And before I respond to the questions, I have discussed them with counsel as well.
>
> Without telling me exactly how the jury stands one way or the other, can you give me some idea or give us an idea about the numerical count, how might it stand? Seven/five, six/six, four/eight?
>
> JUROR LEWIS: Approximately ten to two, Your Honor.
>
> THE COURT: Do you feel as though if I allow you to continue to deliberate, you might be able to reach a decision in the matter?
>
> JUROR LEWIS: I think there's a possibility, Your Honor.
>
> THE COURT: I'm going to let you do that. The statutes provide for what happens in the event that you folks aren't able to reach a decision, but I can't tell you what that is at this point in time.
>
> So that's the answer to your first question. I am unable to tell

you.

The answer to the second question is that I feel as though the instruction itself is self-explanatory. And we would hope with that in mind, that you might be able to reach a decision.

I suggest that you take as long as you might want to take. Don't rush. Please, do not rush, all right?

JUROR LEWIS: Thank you, Your Honor.

THE COURT: You are welcome.

After that colloquy, the jury resumed its deliberations and eventually returned a sentence of death. The mistake in special instruction 60 was not discovered until after the jury's verdict was received. When the error was discovered, Petitioner moved to set aside the verdict. The trial court denied the motion.

The penalty-phase jury instructions repeatedly stated that the only possible sentences that the jury could impose were death or life without parole. For example, the jury was instructed:

> It is the law of this state that the penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstance charged in this case has been specially found to be true.

The jury also was instructed:

> You are instructed that life without parole, that verdict, means exactly what it says. That the defendant shall be imprisoned for the rest of his life.

And when reading the instructions to the jury, the trial court began by informing the jury that it could have written copies of the instructions if it wished but,

> [i]n the event there are any delineations or modifications, you are not to take that into considers [sic]. You are only to take the text as read to you as follows.

Finally, the jury was given only two verdict forms, one for the verdict of death, and one for the verdict of life without parole.

On direct appeal, Petitioner argued that the erroneous instruction clearly confused the jurors and led them to believe that, if they could not *unanimously* agree on a verdict, then Petitioner would receive life *with* the possibility of parole. The California Supreme Court rejected that argument. *Morris,* 279 Cal.Rptr. 720, 807 P.2d at 998. In rejecting the argument, the court concluded that (1) the jury had merely asked for a *general explanation* of special instruction 60, and there was no way to know whether they were confused by the typographical error or by some other aspect of the instruction, *id.* at 996; (2) Petitioner's interpretation of the mistyped instruction was "physically impossible" because the jury was not given a "life with parole" verdict form, *id.;* (3) Petitioner's interpretation was "logically inconsistent" because the jury repeatedly had been informed that the only possible verdicts were death and life without parole, *id.* at 997-98; and (4) the error was only in the typewritten copy of the instructions, and the jury was instructed that the text of the instruction *as read* controlled over any "delineations or modifications" in the typewritten instruction, *id.* at 997.

Justices Mosk and Broussard dissented separately. Justice Broussard's dissent contains a long discussion of this claim, which includes the following observation:

> [T]he majority fail to see the potential connection between the erroneous instruction and the jury's simultaneous inquiry with regard to the consequences of a jury deadlock. The jury did not need to interpret the special instruction literally in order to prejudice [Petitioner]. *As noted, the jurors were obviously concerned about the effect of a deadlock on [Petitioner's] future; one or more jurors may have feared, in light of the erroneous instruction, that if the jury was unable to arrive at a unanimous decision the court might be required, by the unspecified statute to which the court referred, to sentence [Petitioner] to life imprisonment with the possibility of parole.* In my view, this is a plausible, perhaps even a likely,

> explanation of why the jury asked what sentence would be imposed in the event of a deadlock and for an explanation of special instruction No. 60.
> *Id.* at 1005 (emphasis added).

Petitioner made that argument to the district court in claims 36 and 40 of his federal habeas petition. The magistrate judge agreed with Petitioner's argument and recommended that the case be remanded for a new penalty phase. The magistrate judge concluded that the issue was controlled by *McDowell v. Calderon,* 130 F.3d 833, 837-38 (9th Cir.1997) (en banc), in which this court held that the trial court's failure to explain a correct jury instruction to an obviously confused penalty-phase jury violated the Eighth Amendment. [FN4]

> FN4. In *Weeks v. Angelone,* 528 U.S. 225, 120 S.Ct. 727, 732-33, 145 L.Ed.2d 727 (2000), the Supreme Court reached the opposite conclusion on essentially the same facts (during penalty-phase deliberations, jurors informed the trial court that they were confused by a correctly typed and constitutionally adequate instruction, and the judge directed them only to look at the text of the instruction). *Weeks* appears to overrule *McDowell. See also Coleman v. Calderon,* 210 F.3d 1047, 1049 n. 1 (9th Cir.2000) (acknowledging that *McDowell* implicitly was overruled on another issue by the Supreme Court's decision in *Calderon v. Coleman,* 525 U.S. 141, 146, 119 S.Ct. 500, 142 L.Ed.2d 521 (1998)).

The district court rejected the magistrate judge's recommendation and held that the mistyped instruction did not rise to the level of constitutional error. The court observed that the jury did not indicate a *specific* concern or question about the instruction, but merely asked for a general explanation. Nor did the jury return with "a follow-up question, which would have

been evidence of juror confusion." In view of the totality of the circumstances, the court reasoned, "the assumption must be" that "the jurors, through their collective debate and discussion, reached the inevitable conclusion that the instruction contained a typographical error." Further, the court concluded that, even if there was constitutional error, the error was harmless.

Because Petitioner is arguing that he was prejudiced by an allegedly ambiguous jury instruction, this issue is analyzed under the two-step process set out in *Coleman,* 525 U.S. at 146, 119 S.Ct. 500. As noted, *Coleman* requires us to decide (1) whether the asserted error was "constitutional error" under *Boyde;* and (2) if so, whether the error was harmless under *Brecht.*

Petitioner argues, first, that there is a reasonable likelihood that some or all of the jurors understood special instruction 60 to mean that, if they could not agree unanimously on a penalty, then Petitioner would receive life *with* parole. We agree. That is the most logical inference that can be drawn from their question to the trial court. When they presented their question to the court, they had reached an initial impasse; they could not unanimously agree whether Petitioner should receive death or life without parole. So they asked the court "what would be the sentence imposed" if they could not unanimously agree. At the same time, they asked for clarification of special instruction 60.

Because they asked about that instruction at the same time that they asked about the effect of a deadlock, it is logical to assume that they thought that instruction 60 spoke to the issue of deadlock. After all, no other penalty- phase instructions contained an explanation of what happens in the event of a deadlock; understandably, the jurors were not instructed that, if they were unable to make this terribly difficult decision, they would be sent home and the state would try again with a new jury. And it is clear from their first inquiry to the court that they

believed that Petitioner would receive *some* sentence (rather than a new penalty-phase trial) if they deadlocked. Recall that their question was not "what will happen if we cannot agree 100%," but, rather, "*what would be the sentence imposed* " in those circumstances. (Emphasis added.)

Special instruction 60 can be read as answering that question. The instruction is directed to individual jurors and instructs them that, if they have reasonable doubt about the appropriate sentence, they should impose the lesser sentence. But, if the instruction is read as applying not to individual jurors *but to the jury as a whole,* then it has a somewhat different import. So read, it appears to state that, *if the jury as a whole* cannot decide on the appropriate sentence, then it *must* impose a particular sentence. In other words, the instruction can be read as a "deadlock instruction" that informs the jurors of the consequences if the jury cannot agree unanimously on a punishment.

So, it is clear that the jurors initially were deadlocked and that they did not know what would happen if they remained deadlocked. And it appears likely that they thought that special instruction 60 was relevant to that question. It is also apparent that they were confused by the instruction, and rightly so; they repeatedly had been instructed that the only sentences available to them were death and life *without* parole, but the instruction as typed appeared to provide that, if they could not choose one of those sentences, then Petitioner would receive life *with* parole.

The jurors took their questions to the trial court, which unwittingly exacerbated the problem. First, in response to the jurors' question about what would happen if they deadlocked, the court (properly) urged them to go back and try again to reach a unanimous verdict. The court also informed them that "[t]he statutes provide for what happens in the event that you

folks aren't able to reach a decision, but I can't tell you what that is at this point in time." Second, in response to their request for clarification of special instruction 60, the court stated that "the instruction itself is self- explanatory. And we hope that with that in mind, that you might be able to reach a decision." In sum, the court informed the jury that (1) there was a consequence if they came back deadlocked; (2) the consequence was mandated by "statutes"; (3) the court would not tell them what the consequence was; (4) the mistyped jury instruction was self-explanatory; and (5) "with that in mind," they should try to reach a decision.

In the circumstances, there is a reasonable likelihood that one or more of the jurors interpreted the instruction as Petitioner suggests. If the instruction is deemed to be self-explanatory, then clearly it can be read to mean that, if the jury cannot choose between penalty A and penalty B, the court would impose penalty C. If one or more jurors understood the instruction in that manner, then the error is of constitutional significance. So understood, the instruction would suggest to any holdout juror that, if he or she did not join the majority of the other jurors, then Petitioner would be eligible for parole. That suggestion is, of course, incorrect, and its coercive potential is obvious; in effect, it would place such a juror in the apparent position of choosing between death and life *with* parole.

The state presents several arguments in opposition to Petitioner's claim. First, it argues that there is no reasonable possibility that the jury misinterpreted the erroneous instruction, because it repeatedly had been instructed that the only possible sentences were death and life without parole. In the circumstances, the state argues, it would be a logical impossibility for Petitioner to receive any other sentence. In the same vein, the state notes that the jury did not receive a "life with parole" verdict form.

It is clear from the instructions that the jury was told that it could only *agree* to sentence Petitioner to death or life without parole. But that is not the difficulty here. The question that the jury posed was what would happen if it *could not agree* on either sentence. Special instruction 60, as written, appears to answer that question. To be sure, the answer that it gives is puzzling. But it is not a logical impossibility. Everyone is familiar with the tactic of forcing a choice between two alternatives by threatening an unpleasant third alternative ("I want to rent *Alladin!* " "But I want to rent *Tarzan!* " "If you kids can't decide in five minutes, we're not renting anything!"). As lawyers, we know that such sentencing coercion was a *legal* impossibility under California law, but these jurors were not lawyers. They logically could have believed that the self-explanatory special instruction 60 meant what it appeared to say: If they could not make up their minds between the two available sentences, "statutes" would require an unpleasant third alternative. To quote Justice Broussard's dissent on this point in the California Supreme Court:

> Thus the jury would be effectively coerced into unanimity if the dissenting jurors could not countenance allowing [Petitioner] the prospect of parole. However illogical [that] interpretation may appear to persons who are familiar with the workings of the law, [it] is a plausible interpretation of the instruction that the court submitted to the jury and, upon the jury's inquiry, directed that the jury follow.

Morris, 279 Cal.Rptr. 720, 807 P.2d at 1005.

Next, the state argues that the trial court's instruction that, "[i]n the event there are any delineations or modifications, you are not to take them into considers [sic]. You are only to take the text as read to you as follows," defeats Petitioner's claim. But there were no apparent "delineations or modifications" in special instruction 60. Rather, the written copy of that instruction simply substitutes "with" for "without." The gist of the state's argument is that the jury could not have

misinterpreted the *written* instruction, because it was required to follow the *spoken* instruction, which it had heard once in the middle of the trial court's uninterrupted reading of 13 pages of jury instructions. In the circumstances, it is too much to expect that any juror noticed a three-letter mistake in a single jury instruction, let alone remembered that mistake. After all, neither the trial court nor counsel noticed the mistake. Further, the trial court's spoken instruction actually contained *both* versions of the instruction ("return a verdict fixing the penalty of life in prison *with* the possibility of--*without* the possibility of parole"). It certainly is too much to expect a lay jury to sort out which was a misstatement and which was a correct statement--especially in the absence of a clear explanation from the trial court.

Also unpersuasive is the argument that, because the jury asked for only a general explanation of special instruction 60, there is no way to be sure what the jury was confused about. Although it is theoretically possible that something else about the instruction confused the jury, the overwhelming likelihood is that it was confused by the typographical error, which contradicted several other sentencing instructions. Further, the fact that the jury asked about the instruction *in connection with* its question about the appropriate penalty in the event of a deadlock makes it even more likely that the jury was focused on the "without parole/with parole" discrepancy.

Finally, the state argues that the question of constitutional error is answered by the Supreme Court's decision in *Jones v. United States,* 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999). In *Jones,* the Supreme Court rejected the direct appeal of a prisoner condemned under the Federal Death Penalty Act. As in this case, the petitioner in *Jones* argued that the penalty-phase jury instructions might have misled the jury into believing that, if it could not choose between death and life without parole, then the court would impose a lesser sentence. Reviewing for

plain error (because the petitioner had not challenged the instructions at trial), the Supreme Court rejected the argument, concluding that there was no plain error. *See id.* at 390-91, 119 S.Ct. 2090.

Jones is not controlling because, in that case, there was no indication that the jury actually was confused by any of the instructions. The petitioner parsed the instructions and verdict forms and suggested an interpretation of those materials that arguably conflicted with the law, but there was no evidence to suggest that the jury actually interpreted the instructions in that manner or was confused by them in any way. By contrast, here the jury zeroed in on the single mistyped instruction and asked the court to explain it. This jury was confused by the challenged instruction and, as noted, was reasonably likely to have interpreted it incorrectly, in a manner unfavorable to Petitioner.

In sum, the erroneous jury instruction amounted to constitutional error under *Boyde.* Turning to the second step of the inquiry, the error was not harmless under the *Brecht* standard. The jury was deadlocked when it presented its questions to the trial court. The trial court's responses to those questions, while not improper, unfortunately made it more likely that some or all of the jurors would misapply the incorrect instruction. In the circumstances, it is impossible to state confidently that the error did not prejudice Petitioner's substantial rights. "If we are in grave doubt as to whether the error had such an effect, the petitioner is entitled to the writ." *Coleman,* 210 F.3d at 1051. "Because a death sentence is qualitatively different from other forms of punishment, there is a greater need for reliability in determining whether it is appropriate in a particular case." *Id.* at 1049. Here, the error is too obvious, the likelihood of prejudice is too great, and the stakes are too high to conclude that the error was harmless.

We therefore reverse the district court's denial of this claim and order the district court to remand the case to state court for a new penalty- phase trial.

CONCLUSION

For the reasons stated, we affirm the trial court's grant of summary judgment against Petitioner on the guilt-phase issues in claims 1, 2, 14, and 24 as to which we previously granted a COA; we reverse the grant of summary judgment on the penalty-phase issue of special instruction 60 as presented in claims 36 and 40; and remand the case for further proceedings consistent with this opinion and our previous opinion, which proceedings shall at a minimum include a remand to state court for a second penalty-phase trial.

Writ GRANTED in case No. 01-71622.

In case No. 99-99028, AFFIRMED in part; REVERSED in part; and REMANDED.

FERGUSON, Circuit Judge, concurring:

I concur. However, I question whether defendant's counsel was constitutionally competent at the guilt and penalty phases of the trial. The state trial judge's statements regarding the number of death penalty reversals issued by the California Supreme Court under then Chief Justice Rose Bird were improper, especially considering that three Justices of the Court had been recently recalled due to their decisions on death penalty cases. There is no question that the state trial judge made a drastic error by injecting politics and speculation into a capital case.

However, the defendant has not contended in his federal habeas corpus petition that trial counsel was incompetent by failing to move for a mistrial and demand a new jury not prejudiced by

the political statements of the judge. If there was such an allegation, I would have argued that counsel was constitutionally deficient and applied the rule of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to both phases of the trial--guilt and penalty.

Nevertheless, because there has been no such contention made before us nor the district court, I am procedurally barred. In death penalty cases, we should not be prohibited from deciding an issue presented in the record and not be limited by the inability of counsel.

APPENDIX "B"

FILED
Cathy A. Catterson, Clerk
U.S. Court of Appeals
JAN 24 2002

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE WAYNE MORRIS, Petitioner - Appellant, **v.** **JEANNE WOODFORD, Acting Warden of California State Prison at San Quentin,** Respondent - Appellee.	No. 99-99028 D.C. No. CIV S-00483 EJG-GGH
BRUCE WAYNE MORRIS, Petitioner, **v.** **UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF CALIFORNIA (SACRAMENTO),** Respondent. **JEANNE WOODFORD, Warden, San Quentin Prison,** Real Party in Interest.	No. 01-71622 D.C. No. CIV 92-00483 EJG-GGH **ORDER**

Before: FERGUSON, GRABER, and W. FLETCHER, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Graber and W. Fletcher have voted to deny the suggestion for rehearing en banc, and Judge Ferguson has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

APPENDIX "C"

Bruce Wayne Morris B-95129
San Quentin State Prison
San Quentin, Ca, 94974
EY-53

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BRUCE WAYNE MORRIS, Petitioner	Case No: 99-99028 DEATH PENALTY CASE
vs.	
GEANNE S. WOODFORD, Warden, San Quentin State Prison	REPLY To MAGISTRATE Hollows Ruling Dated: August 8, 2001

BRUCE WAYNE MORRIS (Morris), filing PRO SE, Timely Submits The following Response Per order of Magistrate Judge Hollows Ruling Denying My Petition To Withdraw My Appeal.

To: The Honorable Judge Garcia, I have been in contact with The court since March 5, 2001, Trying To End My Appeal. I filed an objection To Magistrate Hollows order, As I felt That My Personal Reasons for Wanting To Stop My Appeal Should Remain Personal. My Petition To Withdraw My petition was Denied on August 8, 2001. I was given 10 days in witch to Ask You To Reconsider my Request. That is why I I am writing To You Now.

I feel That I Should Not have To give my Personal Reasons for Wanting To end My Appeal. But if That is The only way I can have The court grant Me My Right To end My Appeal, I will state My Reasons Now.

1. The U.S. SuPREME Court has for The Most Part Held That Federal Petitions are filed at The descretion of The Petitioner. My federal Writ was filed Against My wishes. I Told My Attorney's I did Not want Any further Review of My case After The Federal District Court Denied My Appeal.

Relief Even After an Evidentiary Hearing is Held, and To force Me to go Through more hearings And spend More Years in Prison is cruel and inhuman Punishment. The U.S. SUPREME court Also has stated That To delay a final Judgment After 15 Years is a cruel act. (Not a direct quote!) I Have Been on Death Row For 15 + Years.

3. I feel That I Should Not be forced To go Through Appeal after Appeal in a case I have No Relief To Look forward Too!

4. I have Long been Told That I have a Right to Abandon My Federal Appeal, That I only had to complet My State Appeal, Then I Could Stop All other Review and Appeals in My case, That I would be granted The Right To Die.

I am only asking The Court to grant Me The same Rights That have been granted To others, That being The Right To End All Federal Appeals, and The Right to a final Judgment in My case.

I Pray That This court will grant My Petition To End My Federal Appeal, and Not force Me to go Through More Appeals That I want No part of.

I Fully understand what I am asking of This court, I also understand That if You grant Me The Right To End My Appeal, That I will Not be able to change My Mind AT a Later date. I assure You That I will Not change My Mind at a Later date! I only want a Final Judgment in My case. That being That My Petition To Withdraw My Federal Appeal, and abandon All other Federal Review be granted.

Signed

Dated: August 14, 2001

filed PRO SE

cc: EDWard J. Garcia, Fed. Judge. BRUCE W. MORRIS
Marianne D. Bachers, Attorney
Ward Campbell, A.G.
J.S. Woodford, Warden

APPENDIX "D"

FILED
SEP 26, 2001
Clerk, U.S. District Court
Eastern District of California

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

BRUCE WAYNE MORRIS,

Petitioner,

v.

JEANNE WOODFORD, Warden, California State Prison - San Quentin,

Respondent.

/

CIV.NO.S-92-0483 EJG/GGH

DEATH PENALTY CASE

ORDER TO SHOW CAUSE RE: DISMISSAL

This matter is before the court on petitioner's objections to the Magistrate Judge's Order denying petitioner's "Motion To Stop Any Further Federal Review and Appeals". The court construes petitioner's objections as a request for reconsideration pursuant to Local Rule 72-303. For the reasons that follow, petitioner's request for reconsideration is GRANTED, and the Magistrate Judge's August 10, 2001 order denying the motion is VACATED. In addition, the court issues an Order To Show Cause why the petition for writ of habeas corpus should not be dismissed.

BACKGROUND

Petitioner, a state prisoner under sentence of death,

filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on June 15, 1993. The district court granted respondent's motion for summary judgment and denied the writ in an order filed June 3, 1999. On appeal to the Ninth Circuit, the judgment was vacated, affirmed in part and remanded, with directions to the district court to hold an evidentiary hearing on certain issues. Morris v. Woodford, 229 F.3d 775 (9th Cir. 2000). The mandate was issued June 18, 2001.

In the interim, on March 5, 2001, petitioner filed a "Motion To Stop Any Further Federal Review and Appeals." Although the motion is directed to the "Honorable Justices of the Ninth Circuit Court of Appeals", it was filed in the district court. No action was taken by the district court on petitioner's motion at the time it was filed because this court did not regain jurisdiction over the case until the mandate was spread. On June 27, 2001, after issuance of the mandate, petitioner again wrote to the court requesting that action be taken on his motion.

In response to both the return of the case from the Ninth Circuit, and petitioner's motion, the Magistrate Judge issued an order setting a status conference for July 18, 2001 to discuss scheduling of the case as well as petitioner's pending motion to terminate his appeal.[1/] By letter brief filed July 12, 2001, petitioner requested the opportunity to personally participate in the status conference, noting that allowing his counsel to speak on his behalf on this issue would create a conflict of interest.

The Magistrate Judge implicitly denied petitioner's request for personal participation in the status conference by holding it without issuing a subpoena directing petitioner's appearance. After the conference, in an order filed July 20, 2001, the Magistrate Judge directed petitioner to inform the court whether his request to withdraw his petition was still

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1. As a result of the status conference, the Magistrate Judge issued a scheduling order which, inter alia, set a date of October 1, 2002 for the evidentiary hearing mandated by the appellate court.

operative, and, if so, the reasons for the request. Petitioner responded in a document entitled "Objection to Magistrate Jude's [sic] Ruling", contending that the Magistrate Judge's refusal to allow petitioner to represent himself pro se on the motion to terminate his appeal was erroneous and an abuse of discretion. Petitioner filed a further document on July 30, 2001, informing the court that his petition was still operative, but declining to elaborate on the reasons for his request to withdraw.

Thereafter, On August 10, 2001, the Magistrate Judge issued an order denying petitioner's motion to stop further federal review and appeals. It is from this order that petitioner now seeks reconsideration.

DISCUSSION

"[P]etitioner is entitled to guide the course of his litigation, including dismissing his action either on his own or through an attorney of his choice, provided he is mentally competent to do so." Mason ex rel Marson v. Vasquez, 5 F.3d 1220, 1223 (9th Cir. 1993) (emphasis added). A review of the record reveals that this is the fourth time during the nine years this case has been pending in the district court that petitioner has sought to withdraw his petition. At no time during any of these occasions has any evidence been presented to the court by petitioner, his attorneys or the Deputy Attorney General to suggest that petitioner lacks the competence to end his appeals. In fact, evidence in the record to date is to the contrary.

On the first occasion, in March of 1993, petitioner sent a letter to the Deputy Attorney General requesting information on how to stop his appeal. In his letter he states that he was obliged to contact the Attorney General because petitioner's attorney would not provide him with the information. (Lodged Sealed Document, filed March 5, 1993).

Following receipt of petitioner's letter, which was forwarded to the court by the Attorney General, the Magistrate

Judge scheduled a status conference at the prison to discuss the matter with petitioner and ordered that a copy of the letter be served on petitioner's counsel. Shortly thereafter the court received a Motion to Cancel Status Conference from petitioner's counsel stating that petitioner, after consultation with counsel, no longer wanted information on the procedure for abandoning federal review of his case and did not want a hearing to discuss the matter. (Sealed Document, filed March 15, 1993).

Second, in a letter directed to the court and received September 30, 1993, petitioner again requested that his appeal be stopped and that he be granted the right to die. In his letter petitioner states that he is aware of what he is asking and that he reneged the first time because his attorneys talked him out of filing the papers that would stop federal review of his case. In response, the Magistrate Judge directed petitioner to write directly to the Magistrate Judge within 20 days if he was serious about his request. (Order, filed October 6, 1993). Petitioner did not send a second letter.

Third, in July 1996, petitioner again wrote to the Court requesting that his petition be set aside and the stay of execution vacated, explaining that on the previous occasions his attorneys had talked him out of this action. In addition, petitioner stated his desire to fire both of his court-appointed attorneys to prevent them from interfering with his decision to stop his appeal. (Letter, filed July 15, 1996, Docket Entry #89.)[2/]

When no response from the court was forthcoming, petitioner sent a letter to Deputy Attorney General Campbell, as well as the Governor of California, requesting information on the procedure for stopping his federal appeal. Copies of petitioner's letters were forwarded to the court by the Attorney

---

2. On August 22, 1996, petitioner reaffirmed his intention to withdraw his appeal, but changed his mind regarding dismisal of his attorneys. (Docket Entry #96)

General's Office. Thereafter, on August 16, 1996, the court issued an order setting a hearing on petitioner's motion and directing his personal appearance.

At the hearing on September 12, 1996, petitioner and the Magistrate Judge engaged in a face-to-face conversation concerning petitioner's desire to terminate his appeal, with petitioner responding to a series of questions propounded to him by the Magistrate Judge. However, at the request of petitioner's counsel, a break was taken, following which counsel and petitioner confirmed that he no longer desired to withdraw his petition. Understandably frustrated, the Magistrate Judge told petitioner he would not entertain any further request to withdraw the petition.

Finally, on March 5 of this year, petitioner began his latest attempt to terminate his appeals and withdraw his federal petition.

Each time he has attempted to exercise his right to terminate these proceedings and withdraw his petition for a writ of habeas corpus petitioner has met the resistance from his counsel. Understandably, counsel are reluctant to advocate a position with which they legally and, perhaps, morally and ethically disagree. However, petitioner is correct. He does have the right to withdraw his petition and terminate all further appeals and review. In fact, absent some evidence of incompetence on the part of petitioner to make this motion, of which a review of the file reveals there is none, it is incumbent on the court to accede to petitioner's request.

In that connection, the court has decided to issue an order to show cause why the petition for a writ of habeas corpus should not be dismissed. Since petitioner maintains, and the record bears him out, that his court-appointed counsel cannot adequately represent his interests in this regard, it may be appropriate for the court to appoint independent advisory counsel to speak for petitioner in connection with his pending motion. Counsel may speak to this issue, as well as the apparent lack of evidence of incompetence, at the show cause

hearing. To assist the court, counsel are directed to file simultaneous briefs prior to the hearing date addressing the issues raised above.

CONCLUSION

1. Petitioner's Objections to the Magistrate Judge's August 10, 2001 Order denying petitioner's Motion to Stop Any Further Federal Review and Appeals is construed as a motion for reconsideration and, as such, is GRANTED. The Magistrate Judge's August 10 Order is VACATED.

2. The parties are ordered to appear and show cause why the petition for habeas corpus should not be dismissed. A hearing on the court's OSC will be at 9:00 a.m., Friday, October 19, 2001 in courtroom No. 8 of the above-entitled court. An order directing the issuance of a writ ad testificandum to secure petitioner's presence at the hearing will be issued under separate cover. Briefs in support of or in opposition to dismissal shall be filed and served no later than Friday, October 12, 2001.

3. The Clerk of Court is directed to serve this order on petitioner at his place of incarceration, as well as his attorneys and the Deputy Attorney General.

IT IS SO ORDERED.

Dated: September 25, 2001

EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX "E"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE WAYNE MORRIS, Petitioner-Appellant, v. JEANNE WOODFORD, Acting Warden of California State Prison at San Quentin, Respondent-Appellee.	No. 99-99028 D.C. No. CV-92-00483-EJG-GGH
BRUCE WAYNE MORRIS, Petitioner, v. UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA (SACRAMENTO) Respondent, JEANNE WOODFORD, Warden, San Quentin Prison Real Party in Interest.	No. 01-71622 D.C. No. CV-92-00483-EJG-GGH ORDER

Before: FERGUSON, GRABER, and W. FLETCHER, Circuit Judges.

1. In Morris v. United States District Court, No. 01-71622, we enter the following orders:

a. We order that the petition for writ of mandamus be accepted for review.

b. Within 10 days of the date of this order, each party shall file a brief, not to exceed 25 pages, addressing the following questions:

(i) whether the district court has jurisdiction to dismiss the remanded portion of the underlying case, Morris v. Woodford, D.C. No. CV-92-00483-EJG-GGH; and

(ii) assuming that it can, whether the district court must hold a hearing with respect to Bruce Wayne Morris's competence to withdraw his appeal, or any part thereof, in view of his allegations of organically related mental impairments. The parties shall address the second question regardless of their answers to the first question.

c. All further proceedings on the "Order to Show Cause Re: Dismissal" filed on September 26, 2001, in the underlying case, D.C. No. CV-92-00483-EJG-GGH, are hereby stayed until further order of this court.

d. The motion to file exhibits under seal is granted.

2. In Morris v. Woodford, No. 99-99028, each party shall file a brief, not to exceed 10 pages, within 10 days of the date of this order, addressing the question whether this court should recall the mandate. This brief may be combined with the briefing on the mandamus action.

APPENDIX "F"

RECEIVED
Cathy A. Catterson, Clerk
U.S. Court of Appeals
OCT 30 2001

99-99028 & 01-71622

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRUCE WAYNE MORRIS, Petitioner - Appellant, **v.** **JEANNE WOODFORD, Warden,** Respondent - Appellee.	**CAPITAL CASE** CIV S-92-00483 EJG-GGH No. 99-99028
BRUCE WAYNE MORRIS, Petitioner, **v.** **UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF CALIFORNIA,** Respondent. **JEANNE WOODFORD, Warden,** Real Party in Interest.	CIV S 92-00483 EJG-GGH No. 01-71622

On Appeal from the United States District Court for the
Eastern District of California
The Honorable Ferguson, Graber, and W. Fletcher, Judge

PLEADING AND LETTER OF MR. BRUCE WAYNE MORRIS WITH SUPPORTING DECLARATION

99-99028 & 01-71622

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRUCE WAYNE MORRIS, Petitioner - Appellant, **v.** **JEANNE WOODFORD, Warden,** Respondent - Appellee.	**CAPITAL CASE** CIV S-92-00483 EJG-GGH No. 99-99028
BRUCE WAYNE MORRIS, Petitioner, **v.** **UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF CALIFORNIA,** Respondent. **JEANNE WOODFORD, Warden,** Real Party in Interest.	CIV S 92-00483 EJG-GGH No. 01-71622

DECLARATION

I, Ward A. Campbell, declare under penalty of perjury as follows:

I am a Supervising Deputy Attorney General for the California Department of Justice assigned to represent the Warden in this case.

On October 26, 2001, I received from our office docketing room the attached pleading to the "The United States Court of Appeals for the Ninth Circuit Court" and attached letter addressed to me from the "petitioner" in this matter, Mr. Bruce Wayne Morris. The pleading and letter were received in our mailroom on October 24, 2001, but I was not advised of its receipt until October 26, 2001. Pursuant to Mr. Morris's

request as set forth in his letter to me, I am forwarding his original pleading to this Court with the attached original of the letter addressed to me. It has been my consistent practice in the past to forward any mail I have received from Mr. Morris directly to the court and counsel. I am serving this Declaration and attachments on Morris's appointed counsel, the United States District Court for the Eastern District of California, and Mr. Morris personally at San Quentin State Prison. I have not corresponded or communicated with Mr. Morris.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Sacramento, California on October 26, 2001.

WARD A. CAMPBELL
Supervising Deputy Attorney General

drb

attachment

Bruce W Morris B-95129
San Quentin State Prison
San Quentin, Calif. 94974
1-AC-8

Date: 10-21-2001

Mr. Ward CampBell,

I am writing This To You in The hopes That You or Your office will forword This To The proper court. I would send it Myself but I don't know The address To The proper court. And I cant ask My Attorneys to file This for Me as They are fighting This action.

Can You please send My Request To The proper Judges and court.

Signed.

Bruce W. Morris

BRUCE WAYNE MORRIS
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B-95129
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San Quentin, Calif. 94974
1-AC-8

MARIANNE D. BACHERS
Attorney At LAW
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CASE No: CIV S92-0483
EJG/GGH
DEATH Penalty Case.

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT COURT

To: The Hornable JuDGes; FERGuson, GRABER, and W. FIETCHER.

My Name is Bruce W. Morris, Im a prisoner at San Quentin State prison, under a sentence of Death.

I filed a Motion in The Federal District court asking That I be granted The Right To end My Appeal in Federal court.

Judge EdWard J. garcia scheduled a hearing To Show Cause Why My Appeal Should Not be dismissed. That Hearing Was scheduled for October 19, 2001 at 9:00 A.M. The Attorney's Marianne D. Bachers, and Tony Tamburello filed a Petition before This court To Stop That hearing; They filed The Petition "Against" My Wishes, or Knolage!

I have been Told That I have The "Right" To End My Federal Appeal! What I am asking The court is simple, do I have The Right To end my Federal Appeal As other Death Row Prisoners Have?

IF it is The courts intention To Take This Right from Me, I would Like to know why. I have Not been shown To be incompatent in any court!

I feel I have been Thru enough for a crime I did Not do,

I feel I have been Thru enough for a crime I did Not do, Now I want This To come To an end.

I am asking This court To grant Me The Right To end My Death Penalty Appeal, or show Me why I am being denied This Right.

Signed.
Bruce W. Morris

Date: October, 21, 2001 filed: PRO. SE.

ORIGINAL

Supreme Court, U.S.
FILED
JUN 28 2002
CLERK

No. 01-1601

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden of the State Prison
at San Quentin,

Petitioner,

vs.

BRUCE WAYNE MORRIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO PETITION FOR WRIT OF CERTIORARI

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BRUCE WAYNE MORRIS

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No. 01-1601

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden of the State Prison
at San Quentin,

Petitioner,

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BRUCE WAYNE MORRIS,

Respondent.

INTRODUCTION AND PROCEDURAL BACKGROUND

Petitioner - San Quentin death row Warden Jeanne Woodford - seeks to invoke this Court's certiorari jurisdiction on two bases. One question concerns Respondent Bruce Morris's previous request to abandon federal court review of his first capital habeas corpus petition. This issue is moot however, because Respondent Morris has advised his attorneys that he now desires to complete review of his state court conviction and sentence of death.[1]

The second question Petitioner has presented to this Court concerns whether the decision of the U.S. Court of Appeals below conflicts with this Court's holding in *Jones v. United States,* 527 U.S. 373 (1999). As we will demonstrate below, the Ninth Circuit's

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[1] See Appendix A: Declaration of Marianne D. Bachers.

decision is not in conflict with *Jones* because Respondent's case differs legally and factually from the situation presented to this Court in *Jones*. Thus, Respondent's second question also provides no basis for an exercise of this Court's jurisdiction., and certiorari should be denied.

Respondent Morris was convicted of the robbery/murder of Ricky Van Zandt in San Joaquin County, California in 1985. The California Supreme Court upheld Morris's convictions and death sentence.[2] A first federal petition was filed on June 15, 1993. There has never been a final disposition of every issue in that first petition.

When this case first reached the Ninth Circuit, the court had before it guilt phase issues related to accomplices' plea bargains and related jury instructions; a penalty phase instructional error; and, a claim that the district court had wrongly denied Respondent an evidentiary hearing into trial counsels' ineffectiveness and whether Respondent was incompetent to aid and assist his trial attorneys. The panel, in an opinion[3] written by Judge Graber, held that Respondent was entitled to an evidentiary hearing on the attorney ineffectiveness and incompetence claims. The court issued a limited remand order, and retained jurisdiction over the substantive issues, which it left undecided.

On a number of occasions while his case has been pending in federal court, Respondent has asked to abandon review of his federal capital habeas case, and then has

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[2] *People v. Morris*, 53 Cal.3d 152 (1991).

[3] *Morris v. Woodford*, 229 F.3d 775 (9th Cir. 2000).

withdrawn those requests.[4] After the Ninth Circuit remanded the case for evidentiary hearing, Respondent again sought to abandon review of his conviction and sentence. The district court then issued an order to show cause why Respondent's habeas case should not be dismissed and counsel relieved of their appointment, and set the matter on for hearing on October 19, 2001.[5]

At the same time Respondent was asking to abandon his habeas case, he was also asserting to the courts, appointed counsel and counsel for Petitioner that he was actually innocent of the homicide for which he was convicted and sentenced to death.[6]

Because it appeared the district court was about to dismiss Respondent's loyal (and so far, successful) appointed counsel, and was about to dismiss a capital habeas case over which the Ninth Circuit had retained jurisdiction, Respondent's attorneys filed a Petition for Writ of Mandamus, Request for Stay of District Court Proceedings and Motion to Recall the Mandate with the appellate court.

The Ninth Circuit stayed the district court proceedings and ordered briefing on

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[4] See Petitioner's Appendix D: District court order to show cause why case should not be dismissed. The district court's order mentions several occasions throughout the pendency of the case when Respondent has changed his mind about litigating his capital habeas case.

[5] See Petitioner's Appendix D.

[6] See Petitioner's Appendix F: Letter from Bruce Morris, sent to counsel for Warden Woodford, which states in part, "I feel I have been through enough for a crime I did not do...". See also Respondent's Appendix B: Declaration of Marianne D. Bachers and Tony Tamburello, filed with the Ninth Circuit, which states that Respondent continued to assert to them that he was actually innocent, and seemed to be suffering from severe depression due to changes in his custodial and visiting privileges on death row.

these issues. Ultimately, the Ninth Circuit recalled the mandate, denied relief on the guilt phase issues and granted penalty phase relief on an egregious instructional error.

I

BECAUSE RESPONDENT HAS ADVISED HIS ATTORNEYS THAT HE WISHES TO SEEK FEDERAL REVIEW OF HIS CONVICTION AND SENTENCE OF DEATH, ANY REVIEW OF PROCEEDINGS RELATED TO HIS PREVIOUS ATTEMPT TO ABANDON LITIGATION IS BOTH UNNECESSARY AND MOOT.

Appendix A to this Brief is a declaration under penalty of perjury signed by Respondent's Counsel of Record. That declaration states that Respondent has informed Counsel of Record Bachers, as well as CJA appointed counsel Tamburello, that he wishes to proceed with federal review of his capital conviction and death sentence. Respondent is aware that his death sentence has been set aside by the Ninth Circuit, and is relieved by that decision. He is looking forward to the evidentiary hearing in district court. Counsel of Record believed that Respondent would change his mind, as he has in the past. Indeed, he has.

Respondent's situation is similar to that in *Lonchar v. Thomas,* 517 U.S. 324 (1996). In *Lonchar*, the habeas petitioner also expressed conflicting desires about abandoning review of his state conviction and death sentence on a number of occasions. This Court ultimately held that where a first federal petition is at issue, the interest in

permitting federal review is quite strong.[7] This Court held that Lonchar's repeated indecision about abandoning review of his capital case was irrelevant where a first petition was concerned, and held that it could not be dismissed under "equitable" doctrines.[8]

Likewise here, where Respondent has made plain to his recognized legal representatives that he wishes to proceed with litigation of his capital habeas case, no further inquiry should legally be made into that decision, given the first petition posture of this case.[9]

In any event, the Ninth Circuit was on solid legal footing when it recalled the mandate and granted the petition for writ of mandamus. Jurisdiction of the case was still in the hands of the appellate court. The district court's authority was limited to holding an evidentiary hearing.

As this Court held:

The mandate of a higher court is "controlling as to the matters within its

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[7] *Lonchar*, 517 U.S. at 330.

[8] *Lonchar*, 517 U.S. at 331-32.

[9] Additionally, and importantly, Petitioner has waived review of this issue. When Petitioner filed the Petition for Rehearing in the Ninth Circuit after that court decided to defer ruling on the substantive legal issues and remand for evidentiary hearing, Petitioner specifically asked the appellate court to decide the substantive issues before remand. Thus, Petitioner cannot now complain that the appellate court did exactly as Petitioner requested in its earlier Petition for Rehearing.

compass."[10]

> When a case has once been decided by this court on appeal, and remanded to the circuit court, *whatever was before this court, and disposed of by its decree,* is considered finally settled. The circuit court is bound by its decree as the law of the case, and must carry it into execution according to mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, *upon any matter decided on appeal*; or intermeddle with it, further than to settle so much as has been remanded.[11]

The district court's order to show cause constituted intermeddling at its most extreme. The order suggested that the lower court was about to dismiss the case out from under the court which retained primary jurisdictional authority over the litigation.

Finally, the Ninth Circuit's action in recalling the mandate was completely within the bounds of *Calderon v. Thompson*.[12] Unlike that case, there was no final decision concerning the claims in Respondent's first federal petition. Additionally, it appeared the district court was about to allow Respondent to volunteer to be executed when the appellate court had intended to set aside Respondent's death sentence – a case over which the appellate court had controlling jurisdiction.

Consequently, the proceedings below concerning Respondent's abandonment of litigation request provide no legal or factual basis justifying the exercise of this Court's

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[10] *In re Sanford Fork & Tool,* 160 U.S. 247 (1895).

[11] *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 168.

[12] 523 U.S. 538 (1998).

certiorari jurisdiction.

II

THE JURY IN RESPONDENT'S CASE SPECIFICALLY INQUIRED ABOUT A PENALTY INSTRUCTION THAT WAS LEGALLY AND FACTUALLY INCORRECT – A SITUATION COMPLETELY DISTINGUISHABLE FROM *JONES V. UNITED STATES*

Petitioner has argued that the Ninth Circuit's grant of penalty phase relief based on instructional error is fundamentally at odds with *Jones v. United States*. This assertion amounts to a legal and factual misstatement.

Petitioner's jury received an instruction that inadvertently contained a typographical error – and therefore a completely incorrect statement of its sentencing options in the case. The instruction (special instruction 60) the jury received stated:

> If you have a reasonable doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty of life in prison *with* the possibility of parole.

The only sentencing options under California law at penalty phase are death or life without parole – thus, this instruction was both legally and factually incorrect.

After deliberating for a time, the jury sent out a note which stated:

> In the event this jury cannot decide 100% on the penalty phase of this case what would be the sentence imposed? Please explain noted page of instructions [special instruction 60].

The trial judge engaged in a short discussion with the jury, and ultimately told

them that he could not answer their question. Then the judge told the jury:

> The answer to the second question is that I feel as though the instruction itself is self-explanatory. And we would hope with that in mind, that you might be able to reach a decision.

After further deliberations, the jury sentenced Respondent to death.

Here, the jury plainly seized upon and asked about the fundamentally erroneous penalty phase instruction. To exacerbate the error, the trial judge told the jurors that the instruction was a correct statement of the law. It was not. Respondent's jury was completely misled about its sentencing options in direct response to an inquiry put to the trial judge.

The *Jones* case is completely different. The jurors in that case did not receive an erroneous instruction. They did not ask the trial court about the instruction which was in dispute. These legal and factual differences establish that *Jones* provides no basis upon which this Court's certiorari jurisdiction should be invoked.

For all of these reasons, the Petition for Certiorari should be denied.

DATED: June 23, 2002

Respectfully submitted,

MARIANNE D. BACHERS
Counsel of Record

TONY TAMBURELLO
Counsel Appointed Pursuant to CJA

ATTORNEYS FOR RESPONDENT

Appendix A

No. 01-1601

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden of the State Prison
at San Quentin,

Petitioner,

vs.

BRUCE WAYNE MORRIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DECLARATION OF MARIANNE D. BACHERS

I, Marianne D. Bachers, declare under penalty of perjury:

1. That I am Counsel of Record for Respondent Bruce Wayne Morris. I have represented Respondent since August, 1992, in federal habeas corpus proceedings related to his state conviction and sentence of death.

2. On a number of occasions, Mr. Morris has attempted to abandon litigation of his federal habeas claims. This has happened, in my opinion, because of episodic extreme depression my client experiences, and due to the changes in his conditions of incarceration. My client last attempted to abandon federal review in the summer of 2001. My co-counsel and I resisted this attempt, in part, because our client was also insisting he

was innocent of the crime for which he had been convicted and sentenced to death, at the same time that he was trying to abandon his habeas case. We believed that our client would, as he has every time in the past, change his mind and decide he did want to litigate the legal challenges to his conviction and death sentence.

3. In fact, our client has told both of us in person, by telephone and in writing, that he does want to seek review of his capital conviction and sentence. He is aware that his death sentence has been set aside by the Ninth Circuit and he is relieved that this has been done.

The foregoing is true and correct. This declaration was executed on June 23, 2002, at San Francisco, California.

Marianne D. Bachers

MARIANNE D. BACHERS

Appendix B

DECLARATION OF MARIANNE D. BACHERS AND TONY TAMBURELLO

We declare under penalty of perjury:

1. We are the attorneys appointed to represent Petitioner in federal capital habeas corpus proceedings. We make this declaration based on our own personal knowledge, and on information and belief.

2. We have been representing Petitioner for nearly ten years. Throughout the time we have represented him, he has occasionally sought to end review of his case. It is our experience that these requests occur when our client is experiencing mental distress. Our client has continuously and forcefully asserted to us that he is innocent of the murder of Ricky Van Zant, and it is that assertion, as well as our belief that the claims raised in his case are meritorious, which have guided our representation of Petitioner.

3. We have filed under seal privileged information which we believe supports the assertions made in paragraph 2, above. Due to the privileged nature of this information, we request that it not be disclosed to any person outside the Court.

The foregoing is true and correct to the best of our knowledge and belief. This declaration was executed on October 12, 2001 at San Francisco, California.

MARIANNE D. BACHERS

TONY TAMBURELLO

EX. D

No. 01-1601

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden of the State Prison
at San Quentin,

Petitioner,

vs.

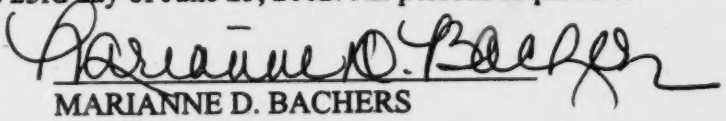
BRUCE WAYNE MORRIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO PETITION FOR WRIT OF CERTIORARI

I hereby certify that three copies each of the foregoing Reply to Petition for Writ of Certiorari have been forwarded to Counsel for Petitioner, WARD CAMPBELL, Deputy Attorney General, 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, via regular US Mail this 23rd day of June 23, 2002. All persons required to be served have been so served.



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(3)

COPY

No. 01-1601

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
AUG 7 2002
CLERK

JEANNE WOODFORD, Warden, *Petitioner,*

v.

BRUCE WAYNE MORRIS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Bruce Wayne Morris was convicted of capital murder in 1987. In 1999, the district court denied relief, but the Ninth Circuit Court of Appeals remanded the case to the district court for an evidentiary hearing pertinent to several of Morris's claims. After the remand, Morris informed the district court (and the Ninth Circuit) that he wished to forego further judicial proceedings. The district court issued an order to show cause why the petition for writ of habeas corpus should not be dismissed and set a hearing date. At the request of Morris's counsel, however, the Ninth Circuit without explanation recalled its earlier mandate, issued a writ of mandamus to prevent the district court hearing, and vacated Morris's penalty based on instructional error. The questions presented are:

1. Whether the Ninth Circuit acted without jurisdiction under Article III and abused its discretion when it vacated the district court's hearing on Morris's request to stop further proceedings and recalled the mandate to decide Morris's case without any determination as to Morris's competency to waive further proceeding.

2. Whether the Ninth Circuit's holding -- that the penalty phase jury was prejudicially confused by a jury instruction that mistakenly stated that if the jury had a reasonable doubt between the penalties of death or life *without* the possibility of parole that it shall impose the sentence of life *with* the possibility of parole -- conflicts with *Jones v. United States*, 527 U.S. 373 (1999).

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-1601

JEANNE WOODFORD, Warden, *Petitioner,*

v.

BRUCE WAYNE MORRIS, *Respondent.*

Morris's counsel admit that they resisted Morris's requests to end the litigation in his case. They do not refute the State's contention that this Court's decision in *Jones v. United States*, 527 U.S. 373 (1999) is indistinguishable from this case. Accordingly, the Ninth Circuit Court of Appeals acted without jurisdiction and in conflict with this Court's precedents when it recalled the mandate and vacated Morris's death sentence.

In this case, the Ninth Circuit Court of Appeals had originally reserved certain issues on appeal and as a matter of "judicial economy" remanded inmate Morris's case for an evidentiary hearing on claims of ineffective assistance of counsel and incompetency in the guilt and penalty phases. *Morris v. Woodford*, 229 F.3d 775 (9th Cir. 2000). Morris then asked the district court to terminate further proceedings in his case. The district court set a hearing to consider Morris's request. However, at the behest of Morris's counsel, the Ninth Circuit preempted the district court, recalled the mandate without explanation, and vacated the death penalty in his case for reasons directly contrary to *Jones*. The Ninth Circuit gave no reasons for preventing the district court from conducting a hearing into Morris's competency to end his case and it did not

even acknowledge Morris's direct request to the Ninth Circuit to waive further proceedings.

The Ninth Circuit's conduct raises two recurring and fundamental issues. First, the Ninth Circuit decided a case without determining it had jurisdiction. Morris's case is symptomatic of the continuing need for this Court to decide the appropriate procedures when Death Row prisoners ask to end their cases. *See, e.g. Hamilton v. Texas,* 497 U.S. 1016, 1017 (1990)(Brennan, J. dis.)

Second, when the Ninth Circuit reversed Morris's death sentence because of a typographical error in the penalty instructions, the panel speculated that the jury was confused to Morris's detriment about the consequences of a deadlock rather than concluding that Morris could not meet his burden of showing that the error actually affected his substantial rights as required by *Jones*. Thus, in determining prejudice, the panel substituted a standard based on "speculation" for a standard based on "actual effect."

I.

THE REPLY FILED BY MORRIS'S COUNSEL DEMONSTRATES THAT THE NINTH CIRCUIT COURT OF APPEALS LACKED JURISDICTION UNDER THE 'CASE OR CONTROVERSY" REQUIREMENT OF ARTICLE III WHEN IT VACATED MORRIS'S DEATH SENTENCE

The reply filed by Morris's appointed counsel buttresses the State's reasons for seeking certiorari in this case. Predictably, Morris's counsel now submit a declaration with a hearsay assurance that Morris now wants to continue his litigation and is "relieved" that his death sentence is vacated. **Conspicuous by its absence** is a personal declaration from

Morris.

Morris's counsel do not dispute that whenever Morris himself has personally spoken about his case, he has asked for the case to be dismissed and has stated that he does not trust his lawyers to represent him on this matter. Thus, this latest uncorroborated declaration from Morris's counsel is meaningless and actually emphasizes why the Ninth Circuit should have permitted the district court to hold a hearing to determine personally Morris's competency to waive further proceedings.

Morris's counsel admit that they defied Morris's requests to end his proceedings. This paternalistic attitude which caused counsel to disregard the wishes of their client is totally at odds with this Court's opinion in *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990). The district court found that each time Morris had

> attempted to exercise his right to terminate these proceedings and withdraw his petition for writ of habeas corpus petitioner has met the resistance from his counsel. Understandably, counsel are reluctant to advocate a position with which they legally and, perhaps, morally and ethically disagree.

(Petn. App. D at 5.) According to the district court, the record bore out Morris's concerns that "his court appointed counsel cannot adequately represent him in this regard. . . ." *Ibid.* Morris's counsel does not dispute the last time that Morris himself actually spoke directly to his intentions was prior to the Ninth Circuit's opinion in which he communicated to the California Attorney General and the Ninth Circuit that his counsel were "fighting" his actions. (Petn. Exh. F.)

When the Ninth Circuit granted the petition for writ of mandamus and motion to recall the mandate that Morris's counsel filed without Morris's permission, it became a party to Morris's counsel in forsaking their client. In doing so, the

Ninth Circuit exceeded its jurisdiction under Article III.

Morris's counsel justify their resistance to their client's desire to end his litigation because he has also maintained his innocence and because he always "changes" his mind. This is no justification for failing to represent their client. *See People v. Lang*, 49 Cal. 3d 991, 1031 (Cal. 1990). Moreover, outside of counsel's own hearsay declaration, there is no evidence Morris has changed his mind. Counsel's declaration must be viewed against the backdrop of the district court's findings and Morris's own assertions that his lawyers could not represent his interests on this issue. There is no explanation as to why Morris, who has shown no reluctance to express his mind when he has wanted to terminate his case, does not now provide a direct statement that he wants his case to continue.

Moreover, Morris's protestations of innocence are not decisive about his decision to end his case. The Ninth Circuit branded his defense at trial as "specious" and described the evidence of his guilt as "unusually strong. . . ." For instance, Morris did not just confess repeatedly to the police that he murdered his unlucky benefactor, Rickey Van Zandt. He also confessed to a disinterested third party and in letters to his own girlfriend. (Petn. App. A at 17; *People v. Morris*, 53 Cal. 3d 152, 176-177 (1991).)

Morris sees the "writing on the wall." He knows that any success now is a Pyrrhic one that will only lead to "appeal and appeal in a case I have no relief to look forward to." (Petn. App. C at 2.) *See, e.g., Wilson v. Lane*, 870 F.2d 1250, 1254 (7th Cir. 1988); *Massie ex rel. Kroll v. Woodford*, 244 F.3d 1192 (9th Cir. 2001). He "appreciate[s] his position . . ." and has made a "rational choice. . . ." *Rees v. Payton*, 384 U.S. 312, 314 (1966).

When a prisoner, like Morris, chooses to forego his legal defenses he "create[s] a mine field for participants in the judicial system. . . ." *Block v. State*, 744 So.2d 404, 405 (Ala.1997) (Taylor, P.J. conc.). Despite the lack of guidance

from this Court or the Ninth Circuit, the district court prepared to traverse that minefield. The district court's hearing would have determined if Morris had the capacity to appreciate his position and make a rational, informed choice. Morris's counsel and the Ninth Circuit frustrated the district court without providing then or now any demonstration that Morris had abandoned his intent to bring his litigation to an end. Nor was there any evidence that Morris was incompetent to make that decision.

When the "minefield" is jurisdictional, a court cannot simply leap over it.[1/] The Ninth Circuit's extrajurisdictional decision requires review.

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1. Contrary to the argument by Morris's counsel, Morris's situation is not "similar" to *Lonchar v. Thomas*, 517 U.S. 324 (1996). Unlike Morris, the court did not ignore Lonchar's expressed wishes, but actually conducted a judicial competency hearing. Moreover, in *Lonchar*, the issue involved whether a district court could dismiss a first petition as delayed for equitable considerations not covered by Rule 9 of the Rules Governing Section 2254 Cases. *Lonchar* does not present the basic Article III jurisdictional issue in this case–an inmate, Morris, who requests to end his pending federal proceedings. *Lonchar* is simply another example of the recurring problem of handling inmates whose intentions regarding their litigation change and evolve over time.

II.

THE NINTH CIRCUIT'S ADVISORY DECISION VACATING MORRIS'S DEATH PENALTY DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENTS SINCE THE NINTH CIRCUIT FOUND PREJUDICE BASED ON SPECULATION ALONE

Without determining that it was merely issuing an advisory opinion, the Ninth Circuit vacated Morris's death sentence because of an erroneously typed penalty instruction that nonsensically stated that if the jury had a reasonable doubt as to whether to impose a sentence of death or life *without* the possibility of parole it should impose an even lesser verdict of life *with* the possibility of parole. The Ninth Circuit's decision deviates directly from this Court's precedent by finding prejudice when the petitioner has failed to show an effect on his substantial rights. Morris's counsel's reply brief simply reiterates the Ninth Circuit's error.

Both the Ninth Circuit and Morris's counsel acknowledge that the same issue was raised when this Court affirmed the death judgment in *Jones v. United States*, 527 U.S. 373 (1999). They both purport to distinguish *Jones* because the trial court in *Morris's* case did not correct the instruction when the jury inquired about it. The Ninth Circuit and Morris's counsel both simply presume that the jury was confused to Morris's detriment and that jurors who were voting for life *without* the possibility of parole were pressured to vote for death to avoid a deadlock and potential lesser sentence of life *with* the possibility of parole so that he would never be released from prison.[2/]

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2. As this Court noted in *Jones*, it is equally plausible that jurors who favored death would have agreed to vote for life

The problem, of course, is that the Ninth Circuit and Morris's counsel ignore *Jones*. Neither the Ninth Circuit nor Morris's counsel acknowledge the explicit language in *Jones* that held that "even assuming that the jury was confused over the consequences of deadlock", the potential meaning of such confusion is too uncertain, indeterminate, and speculative to show an effect on a defendant's substantial rights. *Jones*, 527 U.S. at 394-95. The reply does nothing to rebut the State's position that the Ninth Circuit's decision conflicts directly with *Jones*.

Despite *Jones's* holding to the contrary, the Ninth Circuit plainly reversed Morris's penalty phase based on mere speculation, rather than an actual demonstration of an effect on Morris's substantial rights. The Ninth Circuit's opinion regressed from the series of cases in which this Court analyzed and refined the standard for instructional error based on actual prejudice. *Romano v. Oklahoma*, 512 U.S. 1, 14 (1994); *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *O'Neal v. McAninch*, 513 U.S. 435 (1995); *Calderon v. Coleman*, 525 U.S. 141, 146 (1998)(prejudice finding cannot be based on "mere

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without the possibility of parole. Since the jury was instructed that a sentence of life *without* the possibility of parole meant that Morris would never be released, it would be absurd for jurors favoring death to hold out for that sentence and risk a lesser sentence of life *with* the possibility of parole. The Ninth Circuit also ignored the equally plausible explanation that the jury merely had an understandable technical curiosity about a single isolated instruction that advised it of an absurd potential verdict of which it had never been previously apprised and for which it had received no verdict forms. The Ninth Circuit also did not consider that a jury would have more reasonably concluded that, if anything, the lesser third verdict applied if it concluded that Morris should not receive either of the greater verdicts.

speculation") and *Jones v. United States*. The erosion of this Court's harmless error and prejudice precedents, in defiance of this Court's direct precedent, is a compelling and important reason to grant review.

CONCLUSION

For the reasons stated above and in the petition for writ of certiorari, the petition should be granted.

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